United States Court of Appeals

for the Second Circuit

APPENDIX

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75-1197

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

NORMAN RUBINSON, EDGAR REYNOLDS,
WILLIAM CHESTER, LAWRENCE LEVINE,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

Vol. VI—Pages 1,806a to End

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UNITED STATES COURT OF APPEALS
FILED
OCT 16 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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AFTERNOON SESSION

2:40 p.m.

THE COURT: Did you want to see me, Ms. Harris?

MR. WOHL: Your Honor, over the lunch hour I have looked further into this problem that we were talking about during the morning period, and apparently there is more of a problem than I had thought there was.

I would like to put it into context first.

Mr. Andrews in his summation made the argument which appears primarily on page 6877 of the transcript, referring to the fact that the Government can put in similar acts when it has them and saying that the Government, if it had them, would put them in, and he continues and says, "You have never been shown and you have not during this trial been shown any prior similar conduct or relationship between Mr. Levine and Mr. Wax and anybody else in this case, principally Sidney Stein. If they existed, you would have been shown."

Now, it was in response to that that I made the argument that I did, and I referred to the records of trades of Mr. Wax and also the Lockwood blotter, and I concluded in my statement from page 7097 of the record "But the Government didn't present that originally" referring to these other stocks that had appeared in the records of Wax' and Levine's

transactions that were also testified to concerning Mr. Stein and Mr. Kaye -- "The Government didn't present that originally not because we didn't have it, not because we didn't particularly want to focus on it, but because you should focus on the evidence that is related to Stern-Haskell, and the Government submits that you should not be misled by suggestions as to what is not in the evidence or suggestions that there is something that's been left out because it isn't there."

I think that the Government's position concerning this Lockwood blotter is that it was always our understanding that it was just in evidence. We had represented to the defense counsel that certainly one of the purposes and the primary purpose we were putting it into evidence for was to support the charts, but we thought it was in evidence.

What concerns me, however, and which I noticed during lunch, was that while Mr. Gross was conducting the trial and while I was absent, we put in the records of Mr. Wax' trades and Mr. Gross makes it very clear that they are only coming in as to the trades in Stern-Haskell and he agrees that it is limited to that.

THE COURT: That the documents which he showed those witnesses --

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MR. WOHL: That's right. The witness was Mr. Salvie from A. T. Brod & Company, and the exhibit would be Exhibit 75, which consists of a stack of customers' statements of Mr. Wax' customers at A. T. Brod & Company, and on those customers' statements, which include this Mrs. Dundish and Rabbi Schuchalter and various other people, each one of those includes a trade in Stern-Haskell,but the customers' statements also include trades in other stocks, and I referred to those documents in this argument that I made concerning its references to the other stocks and,of course, at that time I was unaware of the fact that Mr. Gross had, in effect, limited the offer to Stern-Haskell, although I had --

THE COURT: Let me ask you this, Mr. Wohl.

Are those documents, 75, out of that book, 500?

MR. WOHL: No,your Honor, they are not out of the book 500, but I referred to both of these, Exhibit 75 and Exhibit 500 when I made this argument. Exhibit 500 is the Lockwood blotter and it refers to trades in lots of different stocks, including Stern-Haskell, and the other stocks that I mentioned.

Exhibit 75 is the record of customers of Mr. Wax who traded or purchased Stern-Haskell stock.

So Exhibit 500 relates primarily to Mr. Levine,

Exhibit 75 relates primarily to Mr. Wax.

The Government's position as to Exhibit 500 is that we were certainly under the understanding that it was in evidence in its entirety, although defense counsel have stated their position on that, and I think our position continues to be that we never agreed that any references in that were not in evidence and I certainly didn't understand that to be the case, although I can see how it is an area there could be some honest misunderstanding about.

On Exhibit 75, Mr. Wax' records, I am saying the record makes it very clear that was put into evidence only as to Stern-Haskell trades.

Obviously when I made the argument that I made to the jury I was totally unaware of that, because that had occurred while Mr. Gross was conducting the trial and although I read the transcript, I was unaware of it.

The Government's position, your Honor, that, first of all, we would submit that to some extent Mr.Andrews' argument to the jury was improper because he was representing that certain facts didn't exist when he knew they did exist, because he must have been aware of those other trades, showing other trades with his clients in stocks other than Stern-Haskell that Mr. Stein testified about, and that I would submit that the response that I made was substantially

proper in responding to that argument, except that it appears that I did refer to documents or statements which were -- to portions of these documents that were not in evidence, and particularly when I was listing certain stocks contained in these documents and referring to them, and I would submit that in light of the overall circumstances of this situation, that it is something that could be cured by an instruction from your Honor if the defense counsel wanted such an instruction.

I would furthermore submit that because of the way the argument was put, the only defendants affected in any manner whatever would have been defendants Levine and Wax,but I wanted to bring all of this to your Honor's attention, particularly the fact that this Exhibit 75 was clearly limited when it occurred,which I just discovered at luchtime when I reviewed the transcript.

Consequently, if the defense wants it, your Honor, the Government would make an application that your Honor just instruct the jury that they are to disregard my references in my rebuttal to any stocks other than Stern-Haskell.

MR. ROBSON: Your Honor, I very strongly disagree with Mr. Wohl's interpretation of that stipulation, but we have been through all of that.

However, I would object at this point, insofar as my client is concerned, and I think other counsel would agree with me, to any charge to the jury.

I think after this length of time during their deliberations, to highlight this point would only exacerbate what I consider to be already substantial prejudice to all the defendants in this case and not just Mr. Andrews' clients.

MR. ANDREWS: May I be heard, your Honor?

THE COURT: For two minutes.

MR. ANDREWS: I would like to point out two things:

I object at this point in time, some 24 hours later, when the jury has had this summation of Mr. Wohl's for a day to think over by highlighting it now by a limiting instruction, but to give you the flavor of what he has done, in my summation I said, "You have seen no evidence and you can see from this prior similar act doctrince that they have used in these other stocks, Diston and others, you have seen no evidence of any similar transactions or dealings between Wax, Levine," and Stein and these books will not reveal such evidence, it will reveal trades in certainstocks but it won't reveal marketmaking and the kinds of things they brought out about Stern-Haskell.

So even on that level Mr. Wohl is not dealing

with you in candor, Judge. Fundamentally, no, I would absolutely, totally object to any kind of instruction at this point because it would blow it way out of perspective in the jury's eyes.

THE COURT: I agree that to call the jury in now would only highlight it.

In a case like this, that has gone on for six weeks, there is so much evidence in the case that singling out something like this would be prejudicial.

As I said in denying the motion before, the test which the Court would have to apply is whether that statement, assuming it was improper, was so prejudicial as to deny Mr. Levine and Mr. Wax a fair trial.

In reaching the conclusion that it does not do that, you have to look at all the evidence in this case, and we have gone over it now and there is certainly a great deal of evidence and it could not be said that that statement alone was so prejudicial against all other evidence in the case, and everything else which has gone on here, as to outweigh a fair trial.

So it is one of those cases where we often find that the Government has mountains of evidence and this is certainly one of those cases.

In weighing it that way, it could not be said to

be so prejudicial.

If there were very little evidence against Mr. Wax and Mr. Levine, that would be a different story and the weight of that would be very prejudicial, but that is not the case here.

MR. ANDREWS: May I observe, Judge, what we had before Mr. Wohl made the statement was, in this record, no evidence of any prior dealing with Sidney Stein.

To these jurors, I think anybody that had a course of dealings with Sidney Stein has to be an inherently suspect individual and what we had was evidence of one prior business relationship which Mr. Levine threw out of the office and refused to enter into.

Mr. Wohl got up and read off a list of fifteen stocks and said, "If you want to hear it, here it is," and then implying a long,long course of dealings between these men and Mr. Stein and if your Honor feels that is not prejudicial, so prejudicial as to overwhelm any chance of a fair trial, I respectfully disagree.

May I further ask that in case the jury comes back again, that we take that great, big book and move it?

THE COURT: Well,I certainly think that is going a little far. I don't even remember the instance myself,

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and so to say the jury all remember it is just to over-state it.

The problem here is, there is so much for the jury to remember they couldn't possibly remember any one thing like that as so prejudicial. Their problem is they are so overwhelmed with all the evidence in this case.

We are going to take a two-minute recess.

I have another matter to take up.

Please stay in the room.

I have a note here from the jury. 7353

Just a moment.

(Pause)

THE COURT: The young lady who is in the second row in the court, behind Mrs. Haskell, would you stand up?

What is your name?

MS. COHEN. Barbara Cohen.

THE COURT: Were you here last night?

MS. COHEN: Yes, I was.

THE COURT: Were you in a car outside the court-house last night?

MS. COHEN: No.

THE COURT: How did you leave the building?

MS. COHEN: I left by car.

THE COURT: What color was the car?

MS. COHEN: Green.

THE COURT: Who owned the car?

MS. COHEN: A green convertible.

THE COURT: Who owns the car?

MS. COHEN: I own the car.

THE COURT: What is the license number?

MS. COHEN: 101KVV.

THE COURT: Is the car outside now?

MS. COHEN: Yes, it is.

THE COURT: You say it is a green convertible?

MS. COHEN: Yes.

THE COURT: What is your connection with the case?

MS. COHEN: I am just a friend of Mr. Levine and Mr. Wax.

THE COURT: All right. Thank you very much.

Mr. Wohl, was there a witness in this case by the name of Mark?

MR. WOHL: Yes,your Honor. That was Gerald Mark, who was formerly employed by Lockwood & Company.

THE COURT: Where does he live?

MR. WOHL: We will have toget that information, your Honor. It will take a few minutes.

(Pause)

MR. WOHL: The home address is 530 Grand Street

in Manhattan, your Honor.

THE COURT: What was his first name?

MR. WOHL: Gerald.

THE COURT: His name is spelled M-a-r-k?

MR. WOHL: Yes, your Honor.

THE COURT: There is no "s" on it?

MR. WOHL: I don't believe there is, no, your Honor.

THE COURT: There are two things I want to bring to your attention, and one is last night, after I left, and the reporters had gone, the clerk came after me and said that one of the jurors wanted to walk up to the hotel because he is an orthodox Jew and did not want to ride in the bus.

So I came back and spoke to him and told him that we had no way of putting him up here and therefore he should go along in the bus, and he consented to do so.

The marshals have reported that a car downstairs in front of the building followed the bus taking the jurors to the motel where they were staying and they are in the process of investigating that now.

They did get the license number of the car and they have the name of the person to whom that car is registered.

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Of course they apparently didn't get tothe jurors, but apparently there was a car downstairs last night which the marshals observed following the bus containing the jurors.

I wanted to bring those things to your attention.

We now have a note from the jurors, which will be marked Court's Exhibit 10, which reads as follows:

"Your Honor, may we have the list of stocks Stein presented and said he was involved with, Stein's psychiatric records and, if in evidence, the Lockwood trading records," in parentheses, large quotes("And also if we could have the lists of exhibits which Mr. Grimes compiled, we feel we would make it much easier to request exhibits)."

Well, the first thing is the list of stocks Stein presented.

MR. WOHL: There were some referred to in the testimony but the actual physical list was not put into evidence.

THE COURT: I thought a couple of portions of it were.

MR. WOHL: I think it was read from from time to time during cross-examination, but my recollection --

THE COURT: Some of it was marked 3500 which I ruled was not 3500, but the rest of that, and H and K, I think it was, one was marked by a defendant and then there was another one which listed some of the stock and I thought that was in evidence,or was it just turnedover as 3500 material?

MR. WOHL: My recollection is that it was just turned over as 3500 material.

THE COURT: Does any defense counsel have any recollection?

MR. ROBSON: I think it was used as 3500 material, your Honor, but was not put into evidence.

THE COURT: So there is no list of stock?

MR. CHESTER: That is the debriefing list, your Honor.

THE COURT: Is that what that was?

MR. CHESTER: I think it is two pages where Mr. Stein listed all the companies and Ithink we asked him about it and Mr. Rubinson tried toget it in but the Court did not allow it in.

THE COURT: Yes, it was your H and G, Chester's H and G.

The psychiatric report must be Chester's "I".

MR. CHESTER: That is in evidence.

THE COURT: And the Lockwood trading records.

MR. ANDREWS: This is what we have been spending the last couple of hours on, your Honor.

THE COURT: Is there more than one book?

MR. ANDREWS: They mean the large book that --

THE COURT: I understand. I see three books on the table. Was there more than one?

MR. ANDREWS: There was only one Mr. Wohl waved to the jury in his summation. There is only one Lockwood trading blotter or book of any kind that came into evidence and that is the great big one that he waved in front of the jury.

THE COURT: Is that right, there are no other books?

MR. WOHL: Could I have a moment, your Honor?

THE COURT: What is this brown book on the table?

MR. WOHL: These are the transfer records of Stern-Haskell and National Ventures.

There is no other book other than this one, your Honor, Exhibit 500. There areother trading records.

THE COURT: Now, in that book are references to stock traded by Lockwood other than Stern-Haskell?

MR. WOHL: Yes, your Honor.

MR. ANDREWS: Every stock Lockwood ever traded is

listed in that book.

MR. ROBSON: Your Honor, I would violently object to that book going into that jury at this point.

I don't even know what the records are with respect to non-Stern-Haskell transfers and I can only say, your Honor, I must stand here and accuse Mr. Wohl and Ms. Harris of the worst kind of misrepresentation to this Court.

There is no way, your Honor, that any lawyer at this counsel table would have consented to allow in evidence records of transactions that had nothing to do with Stern-Haskell.

There was no way we were of the impression or was the Court of the impression that these records were to go in.

This is the most outrageous thing I have ever come across and I strenuously object and I think the jury should be told this book is only there for supporting the charts and nothing else in that book is to be considered by them and nothing else in that book is in evidence.

MR. FISCHETTI: Your Honor, if you read the note in its entirety, the fact that the jury is asking for the list of stocks Mr. Stein traded and the Lockwood blotter, they are doing exactly what Mr. Wohl asked them

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to do in his summation, and he said, "See how many stocks Stein traded with Wax and Levine" and he named them, said, "They are here in this book, look at the book."

MR. ANDREWS: He said, "Take the list of 250 stocks" and then he named a whole bunch of them, "and look at this book and look at them."

That note comes right out of Mr. Wohl's mouth.

I don't know what to do, to sit down and cry or what, to have this happen now, but there is no way to handle it fairly. Youcan't deny them the book, because they know about it.

THE COURT: Let me see if I understand your kosition, Mr. Wohl, as you just recently restated it.

Is it your position that that book is in evidence? Yousaid that Mr. Gross, when you were not here, limited some document which does not come from that book, is that it?

MR. WOHL: That's right, your Honor.

THE COURT: To the trades of Stern-Haskell? That is what you said?

MR. WOHL: Yes, your Honor. That applied to Exhibit 75.

THE COURT: Is it your position that all of the material in 500 is in evidence? We went over that before

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lunch, read the record, and the stipulation related only to whether they were business records and whether they were authentic, and Ms. Harris was asked for what purpose and she said for testimony of witnesses about Stern-Haskell, among others.

We have been all over that. I thought it was the Government's position that the book was in evidence.

MR. WOHL: That is our position, your Honor. I am having some difficulty because it is our position that the book is in evidence and I don't think we ever agreed otherwise, but I think-- well, that is my position, that the book is in evidence, and the problem occurs as to Exhibit 75.

It appears that some of the defense counsel had a misunderstanding on it--

MR. FISCHETTI: All of us.

MR. HIGGINS: All.

MR. WOHL: Well, I don't know how many --

THE COURT: We are not going to reargue it. We have been all over it. We spent 50 minutes on it and the record says what it says and that this came in pursuant to a stipulation, Exhibit 500, that it was authentic, there were records made and kept in the regular course of business and they were admitted to support the testimony of

certain witnesses with respect to Stern-Haskell transactions among others.

That is the purpose of the book.

Now, that is in there. If that went in there, then we could say the book is not in evidence.

MR. HIGGINS: Your Honor, may I be heard?

I ask your Honor to inquire of Mr. Wohl as to whether or not Mr. Wohl is contending that as to this book that is in evidence that he feels that all the entries in there are part of his case and that the stipulation that was originally entered into with counsel was entered into with the assumption-- that Mr. Wohl had in his own mind at the time he obtained the stipulation that he was going to use the other transactions involving stocks other than Stern-Haskell as part of his case, his case-in-chief,and if Mr. Wohl is going to represent that to your Honor, then perhaps we should move on to a factual hearing, but if Mr. Wohl represents that that was not his intention, your Honor, then I think Mr. Wohl would be saying, which I khought he said a few minutes ago, that perhaps your Honor should give a curative instruction to the jury of some type, and I don't know if that is acceptable to counsel, and I don't think it would, but I thought Mr. Wohl was suggesting to your Honor that with respect to [illegible]

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them, the trading blotter and the A. T. Brod records, that the jury should be instructed to disregard Mr. Wohl's comments.

MR. ROBSON: Your Honor, you may recall in addition to the other points which I made when I made my objection to the statement of Mr. Wohl, I pointed out to your Honor that when we stipualted the authenticity of this book, I specifically stated I was not objecting subject to connection.

I submit to your Honor that during the course of the Government's case there was no foundation laid for any connection between the entries in that book and the charges in this case other than the Stern-Haskell entries, so that even if we accept-- and I find it very difficult to accept, but even if the Court accepts Mr. Wohl's statement that there was no limiting stipulation, those records were taken subject to connection and I defy Mr. --

THE COURT: The record does not support you in that the document was admitted.

Do you mean it was not admitted?

MR. ROBSON: It was admitted with the stipulation as to authenticity subject to connection.

THE COURT: To your client?

MR. ROBSON: We made it clear at the beginning

of this case that objections made by one lawyer particularly in subject-to-connection situations were being made on behalf of all counsel.

I was at that point speaking for all counsel with respect tothese exhibits and nobody made any statements --

THE COURT: Well, it is connected in the sense that it is a part of their books and records made contemporaneously with the Stern-Haskell entries, is it not?

MR. ROBSON: The fact that things are contemporary does not make them connected. I am sure every defendant here did all sorts of things contemporaneously with the transactions in this case. I got married during this case but that doesn't make it connected to the facts of this case.

What I am getting at is whether it was admitted solely for Stern-Haskell or other purposes?

MR. ROBSON: I am assuming for this point that your Honor is accepting Mr. Wohl's statement and accepting his interpretation that it was admitted for all purposes subject to connection.

I stated, I stipulated its admissibility subject to connection and I state to your Honor that there is no basis for connecting the non-Stern-Haskell transactions to any evidence in this case.

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They are not similar acts in this case, were not set forth as similar acts at any point.

What does "subject to connection" mean? Is it ameaningless phrase? Did I utter that phrase for nine weeks for no reason, so that your Honor can tell me now I can't argue it? That it is still in there? Where is the connection between the transaction in Computer Calculator--

THE COURT: It is an action that Mr. Andrews injected into the case--

MR. ROBSON: That took place during the summation but it has to be connected to the evidence in the case.

The Government couldn't conceivably introduce evidence--

THE COURT: I recall that the jury sent for the diary of Mr. Lalone. Do you recall that?

MR. ROBSON: Yes.

THE COURT: And I said when Mr. Higgins offered to let it all go into the jury, even though certain portions were not in-- do you remember that?

MR. ROBSON: Yes.

THE COURT: He said he was willing to waive it. I don't know that I can recall right here the name of the case, but I think it is United States v. Adams, where the

Second Circuit said that if something is not in evidence and it is a part of some document which is in evidence, before it goes into the jury, that part which is not in evidence has to be covered up, and that is not a recent announcement, that is at least three or four years old, and every time there was an exhibit entered here, and the lawyer offering it, whether Mr. Wohl or somebody else, said it was only a portion, that would have to be covered.

Do you remember that?

MR. ROBSON: Yes.

THE COURT: Well, this came in without any such objection or limiting instruction from the defense counsel. That is where we started, whether this came in with a statement in the record that this had certain material or data in there which was not to be a part of the exhibit,and we spent 50 minutes this morning going over that to find whether there was any such limitation, when that exhibit was offered.

When other exhibits were offered they pointed out and it was marked in red, and I said, "Cover it up," whatever it was, but when this came in, I am telling you, Mr. Robson, we have been over it, and there was no such limitation

That is the point I am making and the record tends to support Mr. Wohl's position that it came in as an exhibit

without restriction.

MR. ROBSON: Your Honor, I made my statement. I won't belabor it. I think that if your Honor intends to rely on that sort of technicality to allow this jury to see this sort of prejudicial testimony, then I can only say to your Honor that I think we are dealing with a travesty of justice.

We are involved in attempting to obtain a fair trial and not to attempt to get a piece of evidence in that nobody intended to put in and I accuse Ms. Harris of lying to this Court and she knows full well she never intended to refer to anything in that book except Stern-Haskell transactions and Mr. Wohl has an obligation right now to tell this Court that he knows full well that he never intended, when that book was introduced, to refer to anything other than a Stern-Haskell transaction in that book, and for your Honor to allow this jury to consider a 500-page book involving transactions--

THE COURT: That is why I stopped when those exhibits came in, and the record will show it, and I said, "Are all these exhibits coming in?"

When this matter was attempted to be introduced, I was handed an exhibit list this thick (indicating) and that is when I stopped and said, "Are all of those exhibits

coming in? The clerk is going to have to mark them."

That is where we started with all of this and that is when this should have been made clear, that this was coming in only for certain pages or certain portions of that 500.

MR. ROBSON: I read to your Honor a statement by Ms. Harris. If Ms. Harris wants to lie and state she was only referring to the last paragraph of the stipulation, I can't help it. If your Honor wants to believe that lie, I can't help it.

Ms.Harris said on the record that these are offered only for the Stern-Haskell transactions. I say she is a liar when she tells this Court she did not mean to imply that referred to all the documents and I will waive my privilege as a counsel in this case and Ms. Harris can sue me for slander because I do accuse her of lying to this Court.

MR. ANDREWS: I am prepared to say under oath, your Honor, that Ms. Harris specifically said to me,"That book is coming in only as a back-up for the charts we want to put in evidence," and that is why I agreed to it, and because she threw in "for other purposes"who heard it --

MR. KEEGAN: Your Honor, would you put on the record she is laughing in this trial at this moment, after

nine weeks --

MS. HARRIS: I am not laughing.

THE COURT: If any lawyer shouts again, we are going to find out whether it is funny.

MS. HARRIS: Your Honor, may I be heard?

MR. FISCHETTI: Before that, your Honor --

THE COURT: I will hear Miss Harris.

MS. HARRIS: First of all, I am not laughing, I don't know how I could be laughing with what has just been said. There are two points I want to make. As I said before, a draft, a written draft was circulated to counsel of the stipulation and certain suggestions were made and we accepted them.

The following afternoon, just prior to the time when Vogelson was going to take the stand, I went around to counsel and asked them specifically had they read it and attempted to get. because I thought there were no problems, that they had agreed with Mr. Wohl a couple of weeks before, that all these documents would come in -- talked with them about the stipulation.

There is no question but that I said to them that basically these documents were underlying the charts. At no time did anyone talk about or discuss with me Exhibit 500, which is the Lockwood blotter, which had been out here for two weeks for them to look at. So that is the background as far as the stipulation is concerned. There was no discussion whatsoever as to whether or not that particular book would be limited in any sense. I did say, again, that basically we were offering these documents as underlying the charts. I think, your Honor, everything else is

on the record as far as any attempts to limit that to Stern-Haskell.

My second point is, with respect to that remark at the end of the stipulation, where I said, as I recall -- I don't have it before me right now --

MR. ROBSON: "All of the documents are with respect to transactions in Stern-Haskell stock."

THE COURT: Mr. Robson, don't get so excited. What is that referring to?

MR. ROBSON: It is in connection with one stipulation, it is stipulated, stipulated, further stipulated, and then she said all the documents are with respect to Stern-Haskell transactions.

MS. HARRIS: There was a list of exhibits I read up through Exhibit 235, and I am referring to page 4436 of the record, and I read a list of exhibits identifying each group as being Granger records, Lockwood records and TPO records and Shaskan records, and that took us up through Exhibits 236A and B and then Exhibit 500, the Lockwood blotter.

Then I started over again and I was referring, when I started over again, with respect to documents 501 through 669T.

Now, those documents were from various brokerage

houses which is why I dealt with them in a separate paragraph. Unlike the documents from Granger, TPO and those particular firms, which clearly had to do with Stern-Haskell, and your Honor already had an exhibit list for them, from 501 through 669T, your Honor did not have a list and, as I say, they were from at least ten different brokerage firms and when that statement was made at the end of that paragraph, that all of the documents were with respect to transactions in Stern-Haskell stock, in my mind it was by way of identifying those exhibits that are 501 through 669T, which came from various different brokerage houses and had not been identified in any way before on the record.

THE COURT: You are saying then that that last sentence, "All of the documents refer to Stern-Haskell stock" refers to Exhibits 501 through 669T?

MS. HARRIS: That's correct.

MR. ROBSON: In her mind, your Honor.

MS. HARRIS: In my mind, your Honor.

MR. ROBSON: Not on the record, but in her mind.

MR. FISCHETTI: This was just brought to my attention, your Honor. Miss Harris has stated to your Honor that she never said to anyone that this was only to be used with reference to Stern-Haskell. I categorically

call her a liar. She stood right over there, Mr. Schatz stood right over there, they put the blotter on the desk and said to me one morning, "This is going to be offered with reference to Stern-Haskell."

I said to Mr. Schatz, "Does it have anything to do with Jerry Haskell?"

And he said to me "It only relates to Stern-Haskell trades with Lockwood & Company," and we have no evidence that Mr. Haskell -- I never looked at the book. Those were his words. Swear me in and I will testify to them under oath. My client just tells me now, for the first time, and maybe Mr. Wohl doesn't know this, Jerry Haskell's name is in that book trading stock with Lockwood & Company in the name of Beau Giroux which Stein testified was an illegal transaction.

THE COURT: I don't follow that at all.

MR. FISCHETTI: I have learned now for the first time that my client's name appears in Exhibit 500 in trading a stock other than Stern-Haskell, a stock by the name of Beau Giroux, which Mr. Stein testified was one of his illegal transactions. When Mr. Schatz told me he was going to offer that book with Miss Harris, I asked them, "Does it have anything to do with Jerry Haskell" and they informed me no, they are offering it only for the Stern-Haskell

trades with Lockwood & Company. I therefore did not look through that book, which contains all of Lockwood trades. If that book goes into the jury room, there is an additional problem here, forgetting for the moment the problem with Wax and Levine, a juror may look at a page and see that Mr. Haskell traded stock with Wax and Levine which didn't come into evidence through this case and which I would have strenuously objected to if I knew it was there, and I didn't know it was there, and I want to make this very clear because Mr. Schatz and Miss Harris told me directly, openly that it wasn't offered for that purpose.

All I can tell you Judge is what they said and if your Honor wants to hear it under oath, I will be glad to say it under oath if you give me the opportunity to cross examine Miss Harris.

She is lying to you if she denies she didn't tell me that right at this table. Seven lawyers are not going to stand up here and tell you that two people are lying--

MR. ANDREWS: Told every one of us the same thing.

MR. RUBINSON: I didn't say a word yet, Judge, but I have been listening to this, trying to talk about General Auto Parts, Calculator Computer and these companies for nine weeks now and you had six side bars on me, in the

summation there was a side bar. The minute I mentioned General Auto Parts, or Calculator, and now this book I find out that Stein was dealing with these stocks with Levine.

Now, the jury heard every word out of my mouth trying to justify the spin off as to my state of mind, bearing down on these stocks and now we find Stein manipulated these stocks, according to him, and did business with Lockwood. I maintain that I want to adopt every motion here and on behalf of everybody and myself.

THE COURT: Mr. Chester?

MR. CHESTER: Well,the problem is, just as Mr. Rubinson put it, apparently we are all going to get convicted over something in a book that was not even in the trial. We have sat here eight weeks for nothing.

Now a book is going to them and Sidney Stein's rap sheet, his confession is going to them, they are going to take all the stocks -- of course, he said he would confess to anything, he put everything down, even spitting on the sidewalk, because he wants to be cleared, once and for all and what this trial will come down to is two sheets which Mr. Stein debriefed himself on and this book, every time they look in this book and find a stock that Mr. Stein says -- all he does is list the stocks, but they have assumed that he has manipulated these stocks and every time

they look in this book and look at Stein's record, this trial has come down to Stein's record and this book.

THE COURT: First of all, Mr. Stein's record is not in there. That is 3500 material.

MR. CHESTER: But that is what they want.

THE COURT: They can't get that.

MR. ANDREWS: But, Judge --

THE COURT: Just a minute, Mr. Andrews. You have had a chance to speak. I am talking to Mr. Chester right now.

MR. CHESTER: The point is, this proves Andrews' point. We know what they want now. The summation made by him when he said "Here they are. If you don't think they are thieves, take this book in with you and look at it." They believe what he said. He was vicious in his summation, he was panicky, he thought he was losing the case, would do anything, and he did anything and now we wasted eight weeks and now we know the jury believed him, they want the book, they want Sidney Stein's confession and if they find one other stock Levine traded in this book over and above Stern-Haskell we are all convicted on Sidney Stein again.

MR. ANDREWS: I would like to be heard, your Honor.

THE COURT: Just a moment. I would like to look up something.

(Pause.)

MR. ANDREWS: What happened is this, your Honor. Sidney Stein got on the stand, just so I can tell you what I think is the significance of this development -- he got on the stand and told us he got immunity as part of his deal for every stock fraud and manipulation he ever did. He then said, "I did 250."

On cross examination someone asked him if all those were frauds and he said, "I consider every stock I dealt in to have been a fraud." He listed on that list 250 stocks, giving himself a blanket cover for anything that may have been wrong with them, even though probably most of them were legitimate trades.

Now, the jury thinks he did those 250 manipulations. He had a legitimate account at Lockwood & Company during 1969 and the witness Ochart testified that Stein had all of his trades and that book shows the trades he did through that account, but because of his own self-serving position saying every stock he touched was a fraud and swindle so he would have immunity for it, he has hopelessly tainted that book.

If we had known during the trial that the Govern-

ment at the last minute, the last sentence, the last outburst, was going to say 250 stocks were rigged by Stein and they are all in that book, we would have spent days disproving the criminality of those, but we were utterly disarmed and because of one little four word phrase at the end of a lengthy rambling argument that this lawyer, Miss Harris, was wont to do during the trial, having told every member of the bar and officer of this Court that that book was coming in solely as a support for the chart, we never ever looked to disprove any connection between it and Stein's malefaction.

The damage with respect to Wax and Levine is irrevocably done, and we know it, because Mr. Wohl has made through the clever last minute use, when I could never rebut, never cross examine, Lockwood & Company, a clearing house for Sidney Stein.

There is no way I can save it. If you deny them the book, there is a bad influence, if you give it to them, we are cooked anyway, when the only evidence in the case was one other transaction Lockwood refused to do.

The overflow to these other people is enormous. I think there is no choice now but to have a mistrial.

THE COURT: Mr. Wohl, in your summation, what stocks did you refer to?

MR. ANDREWS: He has a little red list we found in the book, Judge, and you can read it right off the list. He had planned that out, it was no spontaneous moment. Mr. Schatz has it under his yellow page there. It wasn't the heat of the moment, it was a planned, calculated tactic, when we could never do anything to stop it or explain it. I would like it to be a Court's exhibit, your Honor, if you please.

MR. WOHL: Your Honor, first of all --

THE COURT: What page is it?

MR. WOHL: It starts on 7096 and goes over on to 7097.

THE COURT: Just let me read it.

(Pause.)

THE COURT: All right, gentlemen, the fact that I am reading something doesn't mean we have a recess. Will you please return to your seats.

MR. FISCHETTI: We are trying to find the client's name, your Honor.

THE COURT: This is not the time to look through that book. The time to look through that book was when it was lying around here for months.

(Pause.)

THE COURT: Gentlemen, will you please be quiet?

I am trying to read the record.

(Pause.)

THE COURT: Do you know the page on the record where Mr. Andrews raised this?

MR. WOHL: Yes, your Honor, it is 6877.

(Pause.)

THE COURT: All right, gentlemen.

MR. WOHL: Your Honor, I would like to explain to the Court how I view the situation. First all all, when this Lockwood blotter came in, as Mr. Higgins stated, it was certainly my anticipation that in the Government's case in chief, the only portions of it that we would rely on would be the entries relating to Stern-Haskell.

Nevertheless, it was my understanding that the whole record was coming in but I just didn't expect to rely on anything else. I had anticipated that it was possible that Mr. Levine or Mr. Wax might take the witness stand and in that event -- and they took the position they didn't know Mr. Stein at all, and didn't trade any of his stocks, then I would use that to cross examine him to show that they did.

It was my impression throughout that the book was in and it was buttressed by the fact that there wasn't any discussion about marking things out on it.

On the other hand, I think that this is a somewhat technical point. I think that it is apparent to me that there is certainly a misunderstanding here. I vigorously would say that there has been absolutely no -- I don't retract for one minute from the factual statements I made on the record and Miss Harris made on the record, because I think they are all entirely accurate, but I do say it is obvious to me that there is a misunderstanding and the Government doesn't seek to rely on some kind of a technical point of whether it was masked out or not masked out in a matter of importance such as this.

So I would think that the Government would certainly request that your Honor not allow the jury to compare the stocks that Sidney Stein traded with the stocks in the Lockwood blotter and I would also say I have no idea whatever whether there are any references in that book relating to Mr. Haskell or Mr. Gardner.

Mr. Schatz who has gone through it, tells me he has checked it for Mr. Gardner and there are no such entries and he doesn't know of any relating to Mr. Haskell, I don't know of any entries relating to Mr. Reynolds or Mr. Feiffer --

MR. FISCHETTI: I just saw two, Judge, Mr. Feiffer and Mr. Reynolds --

MR. RUBINSON: Well, Calculator Computer --

MR. WOHL: It is apparent to me that if there are such entries, even though I think that the better practice would have been to make it clear at the time so that we wouldn't have this misunderstanding, as I view the situation, it is apparent to me that the defense counsel were under one impression and we were under another impression, and I certainly don't think the jury should be allowed to look at the whole thing and leaf through and pick out the names of various defendants.

So I think the matter has to be cured in some manner, and I think it can be. I think that there is a substantial amount of other evidence in the record that shows that Mr. Stein was holding his activities at Lockwood a good deal, from the various witnesses who testified that that was a secondary telephone number they could reach him at, and I think that if your Honor were to in some manner instruct the jury that there were other stocks mentioned in my final argument, that they should just disregard that and that they are not going to see the blotter, I think that is the best we can do.

MR. ANDREWS: The blotter is irrelevant and immaterial and shouldn't be considered by them and they should disregard Mr. Wohl's remarks, that might help, but

won't cure it.

MR. HIGGINS: Your Honor, I think Mr. Wohl has just now, in good faith, in response to the questions your Honor put -- Mr. Wohl has basically said to your Honor, in substance, that at least, whether knowingly or unknowingly, defense counsel were given a wrong impression, they were misled, maybe knowingly or unknowingly, and that is not the question, but they were of a certain state of mind because of representations by the Government.

In view of Mr. Wohl's concession on that, I think that your Honor, to give any instruction, if your Honor chooses to do so, your Honor must emphasize and make perfectly clear to the jury that Mr. Wohl misrepresented certain things to the jury, that he did so whether knowingly or unknowingly, but that he did it, it was totally improper, the jury should draw no inference, in very, very strong language.

It should not be a more or less whitewash type of thing, there are other witnesses who talked about Mr. Stein being at Lockwood and Company, but it should be a very, very emphatic charge, a critical charge highlighting to the jury saying what the Government did is improper.

THE COURT: Let's get to whether it was an impropriety only on the part of the Government.

At page 6877 of the record, during Mr. Andrews' summation, he said to the jury as follows:

"Now, you know, you have learned from this trial that prior similar acts can be proven for certain purposes by the prosecution. You know that if someone does something which the prosecutor says is wrong, the prosecutor, under some circumstances, is entitled to show similar prior conduct for certain purposes, which Judge Motley will instruct you about when she charges you on the law.

"But, nevertheless, they can show it, and they eagerly try to show it whenever they have it. You have never been shown and you have not during the trial been shown any prior similar conduct or relationship between Mr. Levine and Mr. Wax and anybody else in this case, particularly Sidney Stein.

"If they existed, you would have been shown. Remember, Diston transactions were offered against some of these other men for reasons that Judge Motley will tell you. You never saw it here with them. The only relationship we know about in this case, and the only one that existed between Mr. Stein and Mr. Levine involved one transaction and that was the Blank Furniture deal", and then he goes on, of course, about the Blank Furniture deal.

Now, that is what precipitated Mr. Wohl's remarks

which appear at page 7096 of the record. He says as follows: "In addition, Mr. Andrews, after all of the evidence is in, says there isn't any evidence that Mr. Levine or Mr. Wax were involved in any other transactions with Sidney Stein. Therefore, you should find, ladies and gentlemen, that this is a one-shot transaction, that all the rest of the time they were good little boys and they were never pulling off any frauds. You certainly didn't hear him ask that question when Stein was on the stand, did you?

"Did you get into any other deals with Mr. Levine?

"Did you hear him ask that one. Did you hear him ask Mr. Kaye whether there were any other deals with Mr. Levine or Mr. Wax? You sure didn't hear him ask that when the witnesses were on the stand. He didn't have the nerve to do that.

"Ladies and gentlemen, if you want to look at the evidence, you look at this evidence, the Lockwood blotter that is in evidence. Mr. Wax's trades are in evidence. You are going to hear about some other stocks. Do you remember the stocks that Sidney Stein testified were manipulated stock, Allen Electronics, Bata, Arthur Donnis, Beau Giroux Watches, which Kravits testified to, Cadillac Knitting Mills, Calculator Computer, David Auld, General Auto Parts, Fallon-Smith, the Great Imperial stock, Landa, Loric, Viking General? They are all in the record, ladies

and gentlemen, of the stocks being manipulated and brought out on cross examination of the Government's witnesses. You didn't see him have the guts to ask that question when they were on the stand. Well, ladies and gentlemen, just look in Mr. Levine's blotter. If you are really interested in that, look at what Mr. Wax was selling his customers, if you are really interested in that, and you will find an answer to that particular problem, but the Government didn't present that originally, not because we didn't have it, not because we didn't particular want to focus on it, but because you should focus on the evidence that is related to Stern-Haskell and the Government submits that you should not be misled by suggestions as to what is not in evidence or suggestions that there is something that has been left out because it isn't there."

As I have pointed out, Mr. Andrews, got up, contrary to what he knew to be the fact, and represented to the jury that there was no such evidence and that the Government didn't have it.

As we know now, Mr. Andrews knew all the time what was in that book --

MR. ANDREWS: Your Honor --

THE COURT: Now, I am talking. Each of you has had three chances at least to talk and this is not a street

brawl.

We have been over this and you have had your chance to talk.

In other words, Mr. Andrews was the one who misrepresented to the jury what the truth was and that justified the Government, in my view, in letting the jury know the truth was to the contrary.

We do have the immediate problem here of what to do with the jury's request in this most recent letter, Court's Exhibit number 10 --

MR. ANDREWS: Will you hear me, Judge?

THE COURT: No.

MR. ANDREWS: I did not misrepresent, Judge.

THE COURT: I just ruled on what I thought occurred here.

MR. ANDREWS: I said, "Like this, another relationship like this" if you look in that book you will find isolated trades of certain stocks Sidney Stein owned, never find Lockwood doing 5 percent of any stock. I brought out from a witness that Sidney Stein had an account at Lockwood, brought that out myself. I said in my summation" you have never seen a prior relationship like this, Stern-Haskell, with Sidney Stein."

THE COURT: I said I was not going to hear you

any further.

MR. ANDREWS: Judge, you have misinterpreted and accused me --

THE COURT: All I did was read the record. The record shows you said to the jury the Government couldn't prove any prior relationship between Sidney Stein and Wax and Levine. I just read it.

MR. ANDREWS: I said like Stern-Haskell, where they did 90 percent of the stock, and never had that happened That is why I did not misrepresent it. I would request that your Honor more closely read what I said because those words were chosen with great care. I talked about other deals like Stern-Haskell, there never was one like Stern-Haskell. I myself brought out to the jury that Stein had an account there, traded stock at Lockwood. Stein may have had a particular stock where Lockwood did 5 percent of the trading, but never before had they done 90 percent of the trading, or 50 or 20 or 10. I didn't misinterpret to this jury. That book shows isolated trades by Stein which they are going to now interpret as a million for his manipulations and that is not true.

THE COURT: Would you get the marshal out there and have him come in and sit Mr. Andrews down or take him out of the courtroom?

MR. ANDREWS: I am sitting down, Judge.

THE COURT: Now, the jury has asked for these records. The Government's present position apparently is that the defendants were under the erroneous impression that he didn't intend to rely on anything else in that book and as I previously ruled, as far as I could see, the book was in evidence and it was the defendant's lawyers negligence that led to this probably by not pointing out when the document was offered that certain pages only were being offered and making that clear.

In view of the Government's suggestion, that it not go to the jury, I will not send it to the jury. We will send in the Stein conviction report which, as I indicated earlier, was Chester's Exhibit I, and I will explain to the jury that the Lockwood trading books are in evidence only for the purpose of supporting the charts -- is that what they already have?

MR. WOHL: Yes, your Honor, 670 and 671, your Honor.

THE COURT:--with respect to the Lockwood transactions.

The final thing they have here is Mr. Grimes' compilation. Is there any objection to sending in that list of exhibits? Is it printed, Mr. Grimes?

MR. GRIMES: Handwritten.

MR. WOHL: I have not seen it, your Honor.

MR. GRIMES: I will pass that to your Honor.

(Handing)

THE COURT: Does this relate to matters in evidence as well as those only for identification?

MR. GRIMES: Yes, your Honor.

THE COURT: That is our problem. The clerk's list is the same, mine is the same. The Government gave me a list and there are on that list matters which are not in evidence.

So yours is the same as ours.

MR. GRIMES: Yes, your Honor.

THE COURT: So we don't have any list which consists solely of the Government's exhibits in evidence, or all exhibits in evidence, let me put it that way. There is no single list and all the lists contain exhibits which are for identification.

Would you bring in the jury now, Mr. Clerk. Do you have Exhibit I ready.

MR. GRIMES: I have it, your Honor.

THE COURT: Pass it up, please.

(Jury present.)

THE COURT: Ladies and gentlemen, we have your

note which reads as follows:

"May we have the list of stocks Stein presented and said he was involved with."

Now, that list is not in evidence.

JUROR NO. 11: That handwritten list was not put into evidence?

THE COURT: No. I think some lawyer may have had it in his hand, but all counsel agree that that is not in evidence, is that right?

MR. WOHL: That's correct, your Honor.

MR. ROBSON: That's correct, your Honor.

THE COURT: There were many exhibits, as you know, that were referred to, witnesses were shown exhibits to refresh their recollection, and they were not actually received in evidence. That is why I have emphasized over and over again during the charge the only thing in evidence are the documents actually received, because very often during trials, a witness is shown something simply to help him recall a date or something like that.

Stein's conviction report we have here. Would you please hand that to the foreman.

Then with respect to the Lockwood trading records, you will recall that you sent for Exhibits 670 and 671.

Now, the Lockwood trading records, the attorneys

now agree, are in for the underlying data which supports those exhibits. If you wanted those pages, we would have to take them out of the book.

JUROR NO. 11: I don't think so.

THE COURT: With respect to the list of exhibits which Mr. Grimes combined, we went over it and it is the same as the list the clerk has and that I have, in that it contains not only the exhibits actually admitted but those which were simply identified.

Each exhibit is listed and those that have been admitted have been checked off, but that list would give you a lot of stuff which is not in evidence which we can't present to the jury.

All right, thank you, ladies and gentlemen.

(Jury leaves the courtroom.)

THE COURT: All right, we will take a recess.

(Recess.)

THE COURT: I have this requested additional instructions which has been signed by all counsel in this case going over again the matter we have gone over at great length here and I have brought in the jury and explained to them that Government's Exhibit 50 is limited to references to Stern-Haskell and they have the supporting exhibits we have. It is my view that the only thing this additional

instruction is going to do now is highlight the matter and will not cause the jury to wipe from its mind anything which has already been said and the jury seemed to accept right away my explanation as to the blotter and was content not to see it after I explained what it was limited to.

So it seems to me that bringing this matter up again is going to work the prejudice which you think is going to be eliminated.

As Ipointed out earlier, this whole business, the door to this was opened by Mr. Andrews and that caused the Government to take the actior which it took in rebuttal. It is the Court's view that it cannot permit defense counsel in cases like this, to get up and make statements feeling that the Government's hands are tied and then complain when the Government rebuts it, and that is what we have here.

As I have said, I think if there is any damage it has already been done and this instruction is not going to do anything but highlight it.

Bring in the jury. They will now go to dinner and they are going to retire for the night until 10 o'clock tomorrow morning.

MR. FISCHETTI: I don't know if your Honor is aware of this, tomorrow is Palm Sunday and some of them may

be Catholic and I wonder if the Court has planned on services --

THE COURT: Well, nobody has said anything about it.

The clerk is directed to file this requested instructions. 11

(6:45 p.m., the jury returned to the courtroom.)

THE COURT: Ladies and gentlemen, the marshal has advised me that you have to go back to the hotel now because their dining room closes at 8 o'clock, and since you have been deliberating all day, rather than come back after dinner, which would be probably 9 or 9:30, I think you should take the rest of the evening off and resume tomorrow morning at 10 o'clock.

(The jury leaves the courtroom.)

MR. ANDREWS: If your Honor please, may I address the Court?

THE COURT: No, I am not going to hear it any more, Mr. Andrews, not at this point.

(Adjourned to Sunday, March 23, 1975, at 10 o'clock a.m.)

(sunday)
3/23/75
Motley

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United States of America

v. 74 Cr.573

Norman Rubinson, et al.

Sunday, March 23, 1975
10:15 a.m.

(Trial resumed)

(In open court, jury not present)

THE COURT: Good morning, ladies and gentlemen.

Is there any application?

MR. ANDREWS: May I address the Court, your Honor?

THE COURT: Yes.

MR. ANDREWS: Your Honor, I wanted to make perfectly clear to the Court that my opposition yesterday to an instruction regarding the problem that we spent so much time on yesterday, Mr. Wohl's rebuttal summation remarks, my opposition to that instruction which the Government first suggested was based upon the fact that I did not want to highlight the problem to the jury.

Of course that ground disappeared when the jury wrote the note addressing itself to the question of the

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Stein list of stocks and the request for the Stein list of stocks and the Lockwood books and journal.

That made it quite clear they had zeroed right in on the point in their deliberations, and I wanted to make the record perfectly clear my opposition to an instruction is withdrawn,and, indeed, I most strenuously urge that the Court give the instruction that all counsel and the U. S.Attorney were able to work out and deliver to your Honor yesterday afternoon. I think it is possibly the only way to salvage this situation that arose.

Thank you.

MR. HIGGINS: May I be heard briefly?

THE COURT: Yes.

MR. HIGGINS: Everyone fully appreciates Mr. Andrews' position, everyone appreciates your Honor's position. I am sure I am speaking for everyone here if there were any names or invectives used that should not have been, everyone apologizes for that.

I know the issue was a rather strong one and a rather inflammatory one and people may have made statements they now regret.

I know myself personally, your Honor, that I witnessed on several occasions yesterday apologies being made between parties during the recess.

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I think really, your Honor, everyone here is attempting to correct what we feel in good faith is something that could prevent justice from being done.

I think, your Honor, that along with Mr. Andrews' problems, all the other parties feel very strong about this in that that particular argument, if the jury should follow it, tends to corroborate Mr. Stein on a fairly critical point and we are naturally very sensitive to any corroboration of Mr. Stein, particularly on his credibility.

THE COURT: I don't follow that. How does it corroborate Mr. Stein?

MR. HIGGINS: If the jury follows Mr. Wohl's position, namely, that there was a relationship, possibly a criminal relationship, betwen Messrs. Wax and Levine in other stocks, that corroborates Mr. Stein.

If there is smoke, there must be fire. If he has been doing other things, other stocks, with Wax and Levine, well, then he just did not use them in an isolated event; they were not dupes.

I will let Mr. Andrews speak.

MR. ANDREWS: Perhaps on thatpoint I can be more helpful because it is closer to my clients. The problem is, and we brought out during trial, of course, there was a relationship--i.e. Mr. Stein had an account at Lockwood and

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many, many trades through his account took place. That was never disputed.

In fact, it is conceded.

You will remember perhaps the witness Ochart who testified there was an account, to my questions, and it was a good account and that there were trades and Stein always paid on time and delivered stock on time.

The problem is not that. The problem is that I believe Mr. Wohl's remarks, which we discussed at length, and I think there is agreement between myself and Mr. Wohl, Mr. Wohl's remarks seem to indicate that there were transactions like Stern-Haskell which took place between Mr. Stein and Lockwood, Levine and Wax. Like in the sense of the proportion of Stern-Haskell.

The fact of the matter is there never was anything like Stern-Haskell. There were isolated trades of various stocks, but just Mr. Stein's own position, which would have been negligible with respect to the entire issue in a given stock.

There never was a situation where Lockwood traded 90% of the stock in which Mr. Stein had such a large position. Never anything like that.

What we fear is, and what I think Mr. Wohl fears, and what I clearly fear is that the jury will infer there

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were many transactions like Stern-Haskell between Mr. Stein and Lockwood & Company, and there never was anything like it.

In my summation I said you will find, if you look, and there is no evidence, that there was ever anything like Stern-Haskell, no prior similar act like this one, and that is in fact the truth, Judge.

I think the Government agrees that that is in fact the truth.

There were trades, and that's all there were. That's what Mr. Higgins was talking about.

MR. HIGGINS: The point I am trying to get across is as concerns the other defendants there is a tremendous potential for a spillover effect in that if Stein is telling the truth as against Messrs. Wax and Levine, then probably he is telling the truth in the bits of stories he has told about everyone else.

Naturally we are apprehensive about that. We don't want Mr. Stein to be believed on anything. That is why we suggest in good faith, your Honor, perhaps to give that supplemental charge.

THE COURT: I will review the record again with respect to that.

MR. HIGGINS: Thank you, your Honor.

(Recess)

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(In open court, jury not present)

(Time noted: 11:35 a.m.)

THE COURT: During the last hour and 15 minutes I have reviewed what transpired yesterday with regard to this matter and at this time would like to clarify the record with respect to certain matters.

First of all, therecord is clear that during Mr. Wohl's summation to the jury he said, in substance, to the jury, that there was in the record other evidence which showed that Mr. Wax and Mr. Levine had engaged in similar transactions with Sidney Stein-- that is, similar frauds.

The record is also clear that he made that statement in rebuttal to a statement made by Mr. Andrews, which was that the Government had not, as in the case of four other defendants, offered to prove any prior similar act conduct on the part of Levine and Wax, that this was the only transaction of this kind which the Government claimed Levine and Wax had been engaged in,and that there was no evidence of any other transactions between Stein and Mr. Levine.

Do you have that portion I asked you to mark, the remark made by Mr. Andrews yesterday?

(Pause)

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THE COURT: Yesterday, during the course of the discussion Mr. Andrews said the following:

"May I observe, Judge, what we had before Mr. Wohl made the statement was, in this record, no evidence of any prior dealing with Sidney Stein."

Now, what I want to get straight, Mr. Wohl, is whether in view of this requested instruction now, additional instruction which has been requested by all counsel, it is now your position that the Government had no evidence of any prior transactions with Lockwood and Stein which could have properly been characterized as fraudulent as contained in Government's Exhibit 500.

MR. WOHL: I think that is correct, your Honor.

THE COURT: Do you want to read that back, the question and answer?

(Record read)

THE COURT: What I am getting at, Mr. Wohl, is that, as you know, we had a dispute about whether Government's Exhibit 500 was in evidence in its entirety: do you recall that?

MR. WOHL: Yes, your Honor.

THE COURT: And it was pointed out that you held that book up before the jury.

As I said, I didn't recall your holding it up

specifically, but everybody else remembers it, so that is the fact, including yourself, apparently.

MR. WOHL: That's right, your Honor.

THE COURT: Now, the question is whether it is now your statement that there is no evidence in that exhibit, Government's Exhibit 500, having to do with other transactions between Sidney Stein and Lockwood other than Stern-Haskell which could properly be characterized by the Government as a fraudulent transaction?

It was my understanding of what you were saying was that book contained evidence that Sidney Stein, according to his own testimony, was involved in other fraudulent transactions, and that some of those were handled through Lockwood.

That was my distinct understanding throughout this whole discussion yesterday.

MR. WOHL: That is correct, your Honor.

Maybe I can explain it this way --

THE COURT: Now you are saying there was no such evidence?

MR. WOHL: No. What I am saying is that the book shows that Lockwood was trading several stocks that Mr. Stein indicated were stocks that he had been involved in manipulating the market on. The book shows that.

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What I am also saying, however, is that it is my position that just the book, without anything more, would not show that Mr. Levine and Mr. Wax were engaged in a fraud.

THE COURT: That is what you said to the jury, if you read over your remarks.

MR. WOHL: I have read over my statement, and the primary thrust of my intended response was to Mr. Andrews' statement that the evidence shows that the only relationship here between Stein and Levine was the Stern-Haskell transaction and the Blank transaction, and I think that the blotter, Exhibit 500, tends to show the contrary on that score.

But I think that to the extent that I suggested to the jury that the blotter shows that Mr. Levine and Wax were engaged in these additional frauds that that would not be supported in the case of that particular blotter.

I think the Government has evidence, as Mr. Andrews, or certainly his clients may know, since they were the subject of another investigation in another case called Eastern Diversified, that Mr. Stillman and Mr. Kaye testified about -- certainly Mr. Stillman testified about-- that the Government has evidence of other frauds concerning Mr. Levine and Mr. Wax, but that was not --

THE COURT: That is what I am getting at. I am

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getting at that because your statement to the jury was they could look at that and see that they were involved in other frauds.

What I am getting at is whether your statement is based on fact or fiction.

Now, which is it?

MR. WOHL: Your Honor, it certainly wasn't based on fiction, I don't think,in that it clearly established, the blotter itself clearly established that Mr. Levine was trading the stocks that Mr. Stein was cross-examined about, and some of the stocks Mr. Kaye was cross-examined about.

In addition, the Government-- it was not a correct statement, and I was rebutting the statement by Mr. Andrews, that the Government, in effect, had no other evidence of relationships between Mr. Stein and these defendants.

It seemed to me he was saying there wasn't any relationship between Mr. Stein and these defendants other than the Blank and Stern-Haskell transaction.

I was also rebutting that statement.

To the extent that I said there were other frauds, I was referring to evidence the Government does have-- well, I wasn't referring specifically to other evidence the Government has, but I am saying now the Government does have

other evidence, but it isn't contained in the Lockwood blotter.

THE COURT: It is not?

MR. WOHL: No. Some of it is contained in Exhibit 75, which at the time I gave my summation I thought was in evidence in its entirety, which subsequently I learned was not in evidence in its entirety, but only as to entries on Stern-Haskell.

That group of exhibits which contains the stocks traded by Mr. Wax shows that he was also participating in trades with his customers in some of these stocks, and in particular Eastern Diversified.

THE COURT: Do you have that exhibit?

MR. WOHL: Yes, your Honor.

(Document handed to the Court)

THE COURT: This entire folder is Exhibit 75?

MR. WOHL: Exhibits 75 and 76 are there, your Honor. The large sheets are Exhibit 75.

THE COURT: And you say they show trades between Wax or involving Wax and this Eastern Diversified?

MR. WOHL: Yes.

THE COURT: And you say the Government has evidence of fraudulent activity in connection with that stock?

MR. WOHL: That is correct, your Honor.

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THE COURT: Has that been taken up with the defendants?

MR. WOHL: They have been asked to testify concerning that at the SEC. They have, if I am not mistaken, both of them have taken the Fifth Amendment.

THE COURT: They have already?

MR. WOHL: They have both asserted the Fifth Amendment.

THE COURT: In other words, they were called down to the SEC to testify about Eastern Diversified?

MR. WOHL: Yes, and it was formerly called Atlas Megleo. It was the same stock. Eastern Diversified was a name change from Atlas Megleo.

THE COURT: What is the status of that investigation?

MR. WOHL: Thatis still a pending investigation. Frankly, we were waiting to see what came out of this case. At the time that they were asked to testify in this case both defendants Wax and Levine were also asked to testify about Eastern Diversified, and they both took the Fifth Amendment on that.

THE COURT: Is there any other evidence of fraudulent activity by Wax and Levine that the Government knows about?

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MR. WOHL: In addition, your Honor, there had been prior administrative disciplinary actions before the SEC concerning Mr. Wax and Mr. Levine, and although I don't have an exact recall of everything that occurred in those, my understanding is that they were suspended from the securities industry as a result of violations of the Securities Laws.

THE COURT: When was that?

MR. WOHL: That occurred, if I am not mistaken--excuse me a moment, your Honor -- my understanding, your Honor, and I just don't have the record of that right here, is that the activities occurred during the 1960s and that an appeal was finally determined in approximately 1970.

MR. ANDREWS: I can advise the Court with specificity --

THE COURT: Mr. Andrews, whatever you do, do not interrupt this discussion.

MR. ANDREWS: Sorry, your Honor.

THE COURT: With respect to the stocks which you listed to the jury in your rebuttal summation, what is the evidence in Government's Exhibit 500 relating to those stocks?

MR. WOHL: We have not had an opportunity, your Honor, to go through all of Exhibit 500, but from the

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period of April 4, 1969, to June 30, 1969, the exhibit shows that during that period of approximately three months the blotter shows-- this is Exhibit 500-- that in Allan Electronics,Lockwood bought 4300 shares and sold 500.

That as to Beta Orthodontists, and this is a summary I am going by right now-- that they bought 2800 and sold 2300.

As to Bougerie Watches they bought 500 and sold 2400.

As to Cadillac Knitting Mills they bought 200 and sold 900.

As to Calculator Computer they bought 6000 and sold 11,000.

As to David Auld they bought 13,600 and sold 19,200.

As to General Auto Parts they bought 3800 and sold 1600.

As to House of Knitting they bought 13000 and sold 11,200.

As to Fallon Smith, also known as Imperial, they bought 2000 and sold 1900.

As to Lanai Electronics they bought 9000 and sold 1200.

As to Loric they bought 4200 and sold 6200.

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As to Viking General they bought 3500 and sold 5400.

I read House of Knitting, your Honor, because it is not listed in the transcript here but after I gave my summation the Court Reporters indicated I was going so fast at that point that they thoucht that I had mentioned one or two stocks that they didn't get.

It is my recollection that I did mention House of Knitting as well, so I am including that one.

All of those stocks had been mentioned in the record as stocks that Mr. Stein was trading in, and in some instances stocks that Mr. Kravetz was trading in on behalf of Sidney Stein.

Mr. Kravetz was cross-examined on the idea that he was a participant with Mr. Stein and had been trading some stocks, and I believe that he mentioned Bougerie Wrist-watches.

THE COURT: Is it your contention that with respect to those stocks and Sidney Stein there was fraudulent activity?

MR. WOHL: Very definitely. It would be our contention that these were stocks which were manipulated stocks, and I think Mr. Stein so testified, and I think Mr. Kravetz, to the extent he referred to them, so testified.

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In addition, some of these stocks are stocks that have been the result of other indictments or other SEC investigations of one kind or another.

But I think there was evidence in the record that these were stocks as to which there was fraudulent market activity.

THE COURT: You say some of them have resulted in indictments?

MR. WOHL: I believe so, your Honor. I believe that the Lanai case, which I was not involvedin, and I don't know the details of it, but it is my understanding that there was an indictment in that case.

THE COURT: But in any event those are stocks which Sidney Stein listed the stocks as having been manipulated by him and which are reflected on Chester's G and H, is that it?

MR. WOHL: That is correct, your Honor. That is correct.

THE COURT: And he was asked about it on cross-examination, is that it?

MR. WOHL: Absolutely, your Honor. And the Government's position, certainly as I conceived it at the time of my summation, was that the jury would be entitled to make an inference from the fact that virtually all of the

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stocks that Stein testified about and that Kaye testified about are stocks that you find Mr. Levine trading in.

THE COURT: Now you seem to be back to your original position, that the jury could infer from that that contrary to what Mr. Andrews had asserted, there was evidence from which they could find that he dealt with Sidney Stein in other fraudulent transactions.

MR. WOHL: I am saying there was evidnece, but I am also saying that the instruction that all counsel have agreed on is correct in that there was such evidence, but it wasn't really established at the trial. So what I am saying is that my argument was an argument that was made in good faith, and that it was based on information that we had, but I am also saying that this was not something that was really established at the trial.

THE COURT: That's what I was getting at, because yourecall yesterday I said that it was Mr. Andrews who first represented to the jury the Government had no such information, whereas he knew as a matter of fact that they did-- that is, that they had information from which it could be inferred that Levine and Lockwood were involved in other fraudulent transactions with Sidney Stein.

Do you remember that?

MR. WOHL: That is correct, your Honor.

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THE COURT: And I said that since Mr. Andrews had misrepresented the truth, as he knew it, to the jury, the Government had the right to bring to the jury's attention that that was an incorrect statement, based on evidence which the Government had and which was in the record.

Do you recall that?

MR. WOHL: Yes.

THE COURT: What are you saying - that you have the evidence but it wasn't established? Is that the meaning of this request for an additional instruction, that you have the evidence but it was not established?

MR. WOHL: Let's put it this way. That is why the Government agrees to the instruction. I think it is clear-- we can't say exactly that to the jury because then it would not have any curing effect on them to the extent that the Court feels that something has occurred which should be cured.

The reason that I feel it is proper for the Government to agree to that instructionis because, as I see it, we had the evidence, certainly the Government had the evidence, but it wasn't established in the record except to the extent the jury would just want to infer there was this list of stocks, and here you find Mr.Levine trading this list of stocks.

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THE COURT: That's why I am asking you, whether that is the sum and substance of this additional instruction to the jury, that the Government had the evidence of other fraudulent dealings but did not undertake to establish it?

MR. WOHL: That is correct, your Honor.

THE COURT: That is the sum and substance of this instruction?

MR. WOHL: I think that is the underlying assumption of the instruction, that is correct, your Honor. I think we don't put it exactly that way, because I think all counsel--

THE COURT: That is what I am trying to get at, is what I would be telling the jury. I don't propose to tell the jury anything that is not true. So that is what we are trying to get straight now.

MR. WOHL: I think the sum and substance of the instruction is that, No. 1, [... the Government agrees that in thistrial we have not established that they engaged in other crimes other than the Stern-Haskell thing.]

That, No. 2, the Government does not ask the jury to find them guilty in this case based on any assumption or impression that they did commit other crimes, and, therefore, the instruction says the Government does not contend here that they committed other crimes.

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I think that is entirely accurate.

I think that the instruction also states that the argument that I made was based on a good faith misunderstanding among counsel, and what that refers to is my belief at the time I made the argument that the blotter was in evidence, and, therefore, the jury was entitled to look at the fact that Mr. Levine was trading these stocks, and it was my belief at that time, also, that Exhibit 75 was in evidence,and, therefor, the jury was entitled to look at that and see that the stocks that had been mentioned by Mr.Kaye and Mr. Stein were stocks that Mr. Wax was dealing in.

It seems, however, that as to the blotter I am convinced that there was a true good-faith misunderstanding on that, that a number of the defense lawyers were under the impression that that was not in evidence in its entirety. It was my impression that it was based upon the fact that nothing was masked out or anything.

THE COURT: That is a separate point from which you had any basis for saying that there were other fraudulent transactions between Mr. Stein and Lockwood, which we have just gone over. I know now that there was some misunderstanding about whether Government Exhibit 500 was in evidence in its entirety.

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What I am getting at is whether there is any basis in fact that the Government had evidence of fraudulent activities between Mr. Stein and Lockwood because, as I have said, that was my distinct understanding as to what the true facts were.

MR. WOHL: What I am saying is I do believe I had a basis for the statement I made. What I am also saying, however, is that it was not established at the trial.

THE COURT: All right, let's go over it once more then.

It is your contention that the Government has evidence of other fraudulent transactions involving Mr. Stein and Levine and Wax, but you did not undertake to establish it on this trial, is that it?

MR. WOHL: That is correct, your Honor. And also Mr. Kaye and Mr. Levine and Mr. Wax, which was I think included in the argument made by Mr. Andrews and in my rebutting that argument.

That is correct, your Honor.

THE COURT: And so that this requested additional instruction is to so advise the jury, is that it?

MR. WOHL: That is correct, your Honor.

THE COURT: All right.

Mr. Andrews?

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MR. ANDREWS: Just very briefly, your Honor; thank you for hearing me.

I think-- and I appreciate Mr. Wohl's reconsideration and his position and his obvious concern in the interests of justice, that justice be done in this trial.

I do think, your Honor, that everything that's been said until now presupposes the existence of something that really is not so.

What I said in my summation, which it was thought by the Government for a time opened the door to its remarks, what I actually said was there was no evidence of prior similar acts in this record, and indeed I say there is no evidence anywhere of prior similar acts, but that is beyond the trial, without the scope of the trial, and the Government knows how to pursue if it believes in good faith there have been other fraudulent transactions.

The point I made to the jury was there were no similar acts to Stern-Haskell and the context in which that was said was the following:

There were no other deals in which Lockwood traded 90% of the stock, in which Lockwood became the prime marketmaker of any stock in which Sidney Stein had an interest.

THE COURT: Is that what you said?

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MR. ANDREWS: Yes, Ma'am.

THE COURT: You will have to find that. I couldn't find that.

MR. ANDREWS: I am saying the clear thrust of what I said.

THE COURT: I am asking you now what you said. And I said that I looked for it and I couldn't find that.

MR. ANDREWS: I thought when I said similar act I meant it in the same sense that all of the other stocks were offered here. Diston was done identically. National Ventures, some of these others, were done identically to the manner in which Stern-Haskell was done and as I understand it for the Government to prove against Mr. Wax and Levine a prior similar act, so as to negative mistake, et cetera, the similar act would have to have some relationship or some resemblance to what was done in this case.

And I say to your Honor that there never was any other stock, any other deal, which was similar to this in any respect. And I think the proof of it is what Mr. Wohl just told us, Judge.

With respect to some other stocks which Sidney Stein listed, having a motive to do so, as fraudulent, merely because he transacted, and he told us he listed every single stock he ever traded in as fraudulent so as to

get the benefit of the Government's blanket immunity on those stocks.

One: Is it fraudulent? There is no proof it is fraudulent.

Any dealings Lockwood had in those shares were minor. Lockwood traded 531 stocks. The most they traded were negligibly small accommodation trades up to 10 or 12,000 shares, which is by virtue of the float in a given stock, miniscule.

Here in Stern-Haskell they did 90% of the trading. That is what I meant by similar act. I think that is the way it came out.

THE COURT: Let me ask you this then. It is your contention that the Government does not havd any other evidence which shows any fraudulent dealings in stock between Wax and Levine and Sidney Stein? Is that your position?

MR. ANDREWS: Absolutely correct, your Honor. It doesn't appear in this record except --

THE COURT: No, I am not asking you--

MR. ANDREWS: -- to go beyond the trial, I have interviewed my clients at length. I haven't gone into detail in every case, but taking them at what they tell me.

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THE COURT: I am taking the Government's Exhibit 500, which you say is not in evidence as to those other things --

Is it your position that the Government, Mr. Wohl, had no basis for his statement that they could look inthat book and find other fraudulent transactions? Is that your position?

MR. ANDREWS: I must correct,your Honor, because of the fact it shows trades in stocks which Sidney Stein said were fraudulent stocks, but it doesn't show any kind of involvement to establish, even if Stein is right, that they were fraudulent. It does show, and you heard the numbers, miniscule kinds of trading done as accommodations, not for Stein.

I can say if your Honor looked at Merrill Lynch Fenner Piece & Smith's blotter, you would find the same stocks, many houses on the street had some customers somewhere who bought them, and that's all that blotter shows with respect to Wax and Levine.

At the end of the trial, at the last sentence,we were confronted with the fact there were all these others Mr. Wohl believed were similar frauds, never having been given warning we would have to explore each and every one during trial to show they were not frauds, and if indeed

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they were, they were done without the knowledge of Mr. Wax and Levine who may have traded on an accommodation basis the kind of numbers you just heard.

They never traded anything like Stern-Haskell. They nevertraded 90% of the stock.

THE COURT: You didn't say that to the jury. You are asking the jury to read all that into it.

What the suggestion to the jury was, on your part, was that there was no evidence, and the Government has no evidence, of any dealings between Levine and Wax and Stein which could be characterized as fraudulent.

That was what you intended to say, isn't it, to the jury?

MR. ANDREWS: I think that goes too far. I think what I said to the jury was, you will find no evidence of any prior similar act to Stern-Haskell.

THE COURT: That says any fraudulent act.

MR. ANDREWS: I agree, your Honor.

First of all, I don't agree Stern-Haskell was fraudulent with respect to my clients, as the Government claims.

THE COURT: As the Government claims.

MR. ANDREWS: As the Government claims, of course, but that's the very controversy. Even your Honor

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will find if you will go to the record, and will go to the book, there were isolated trades in some of these stocks Stein says were fraudulent, but you will never find anything like Stern-Haskell in any sense of the word.

And I used the word "similar" before everything I said. There is no question there was a relationship. Stein was in and out of the place. He had an account in which he traded, and I brought that out on cross-examination.

So clearly what I was talking about was something on all fours or reasonably close to all fours with Stern-Haskell wherein Lockwood traded the majority of the stock.

You have heard the numbers, Judge. Any activity involving Stein and Stern-Haskell or Stein and Lockwood, and he had none with Wax, but anything involving Lockwood was minimal; 500 shares, 1000 shares, 6000, and usually they were not done for him. Customers called to buy. So there is nothing in this record-- forget about outside the case for a moment, there is nothing in this record of a prior similar act to Stern-Haskell unless you say fraudulent, but prior similar act in my understanding doesn't include all frauds the guy every may have done. It means anything he did this way. And that is 90% of the stock, prime market-maker.

Yousee, that's the sense I meant it in, and I

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thought I had effectively distinguished that by having admitted there is no question there was a relationship, Stein had an account.

One other point my client tells me, Judge. In all of these stocks that Stein mentioned, my clients have never been questioned about Eastern Diversified and I don't even think they took the Fifth Amendment there. They may have in one instance-- before the SEC, but not the U. S. Attorney. Some of those cases resulted in indictments and my clients were never even questioned.

They traded 1000 shares, Judge, and they were never even questioned.

If you take the blotter alone, there is no evidence of any fraud or manipulation. If you take the blotter showing these isolated little trades and then you take Sidney Stein's statement that the stocks involved in those trades were fraudulent-- and let's face it, we know Sidney Stein and we know he has a reason to list as fraudulent every stock he ever traded because he got immunity for it -- the overwhelming prejudice that comes to us from that when it is an area so fraught with doubt and speculation is --

THE COURT: It is your position the Government had no evidence of other fraudulent dealings.

MR. ANDREWS: Other than what we have heard in

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this courtroom, yes, your Honor.

THE COURT: All right.

Then it is your suggestion that Mr. Wohl introduced into this case other fraudulent dealings for which there was no basis in fact, isn't that so?

MR. ANDREWS: Yes. I think this further --.

THE COURT: Let me ask you this then. How do you think this additional instruction will cure that?

MR.ANDREWS: I don't know it can ever cure it, but I think it can remove from the jury the idea that if they had that book it would show other stocks in which Lockwood and Wax traded 90, 80, 70% of the issue for Stein which Stein now says was fraudulent.

THE COURT: Didn't I tell them yesterday that the lawyers have now agreed that that book is limited to data which supports the charge which they now have, Government's Exhibit 670 and 671? Didn't I tell them that?

MR.ANDREWS: Yes.

THE COURT: And didn't I tell them the list of stock which Sidney Stein testified about was not in evidence --

MR. ANDREWS: Yes.

THE COURT: So they don't have the book and the list of stock that Sidney Stein was asked about, isn't that

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so?

MR. ANDREWS: That is correct, your Honor. But what they--

THE COURT: How do you suggest that calling them in now is going to cure what you claim was a deliberate misrepresentation to the jury that stock involving fraudulent activity and Mr.Levine and Mr. Wax and Mr. Stein were involved?

MR.ANDREWS: Because what they do have is Mr. Wohl's statement "that you will find other similar acts if you can look in those books, if you look in those books."

Now they have the Court, for some obviously technical rule which they do not understand, telling them they can't look at the books,but they do have Mr. Wohl, a fine man representing this Government, for whom this Court has great respect, standing before them, who they know would not lie to them, telling them if they look in the book they will find prior similar acts between Stein and Levine and Wax, which we didn't go into because we wanted you to concentrate on Stern-Haskell.

THE COURT: This additional instruction tells them this-- and I am reading from the requested instruction now -- it reads as follows -- and I instruct you that you

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should entirely disregard Mr. Woh's comment because it has not been established, and the Government does not contend, that defendants Levine and Wax and Lockwood & Company committed any criminal acts concerning any of those stocks other than Stern-Haskell.

MR.ANDREWS: I think what it does, your Honor, is it effectively removes from their minds any question that may exist by virtue of the statement that was made, and I might say it would be my opinion if Mr. Wohl and I had had an opportunity to confer before the summation, this never would have come up, because I believe even he recognizes the overwhelming prejudice.

(12:30 p.m.)

THE CLERK: Your Honor,we have a verdict.

(Pause)

THE COURT: Mr. Reporter, do you want to read the last sentence of Mr. Andrews.

(Record read)

THE COURT: Let the record reflect that at that point the jury returned a verdict in this case.

All right, do you want to bring in the jury.

* * *

REQUEST NO. 9

Single or Multiple Conspiracies

Count one of the indictment charges all the defendants named therein with participating in a single, overall conspiracy during the period beginning on or about the first day of August, 1968 and ending on or about July 18, 1969. It charges, in effect, that all the acts enumerated in that count were part of this single conspiracy and that the aims of this central conspiracy were the commission of crimes under the anti-fraud and registration provisions of the security laws. This is the only conspiracy with which the defendants named in this count are charged, and, if you do not believe that the evidence has established beyond a reasonable doubt the existence of this conspiracy, you must find each defendant innocent on this count.

In analyzing the evidence, you must determine whether there was a single continuing overall conspiracy or separate independent conspiracies with separate and distinct groups involved, with no overall central purpose. If you find separate conspiracies and that some of the

REQUEST NO. 9 (continued)

defendants belonged to one and not to the other, then there would be no proof of the single conspiracy charged in the indictment; and in that case, you must return a verdict of not guilty as to all of the defendants under the conspiracy count.

REQUEST NO. 10

General Purpose of the Registration Requirements in the Securities Act and the Various Exemptions

You have just heard me refer to the Securities Act of 1933, 15 U.S.C.A. §77a et seq., which has also been mentioned several times by counsel during the course of this trial. Before I read to you the specific language in the Act with which we are concerned, I shall tell you a little about the purpose of the registration requirements and various exemptions, including the Regulation "A" exemption so that the provisions of the Act will be more meaningful to you.

When a person decides to buy a security, he is in effect purchasing a share of a business enterprise. He is not buying a commodity, such as a household appliance or produce which he intends to use or consume himself. The value of such personal or household articles is frequently not great and can be judged fairly easily by personal inspection. Furthermore, a person does not buy such a household commodity in the hopes of making a profit on the transaction. On the other hand, when a person buys a share of stock in a corporation, profit is usually his only

REQUEST NO. 10 (continued)

motive. Either he gambles on making a quick profit on a jump in the market price of the stock, or he has a desire to share in what he hopes will be the long-range growth in the corporation's business. In either case, the purchaser of stock, as a part-owner of a business, shares in the risk of business failure as well as in the possibility of profit.

A person interested in making an investment in corporate securities obviously must determine the possible return on his investment differently from how he would evalute a new car, a household appliance or a head of lettuce. If the corporation is a large one and his investment is small, it is frequently impractical for him to inspect the corporate business or form a first-hand impression of the corporate officers. He must rely upon other sources for information about the company, its prospects and products, its present financial condition and planned expansions, its management and the terms of the company's securities.

In the Securities Act of 1933, 15 U.S.C.A. §77a et seq., Congress has enacted laws to assure investors that such information will be both easily available and reliable. Those laws require that corporations planning to make large offerings of their securities to the general public file a detailed registration statement fully disclosing the material

REQUEST NO. 10 (continued)

facts relating to the company's properties, business, management, principal stockholders, financial condition and amounts and types of securities outstanding, supported by appropriate financial statements which have been audited andproperly certified by accountants. Of course, each small investor in a corporate issue of stock is not required to examine the registration statement, which is a long and very detailed document, nor need the corporation make sure each investor has seen it. But the filing of a registration statement with the SEC does make certain that such information is available to any investor who cares to make use of it at the SEC office in Washington, D. C. in appraising the merits of the securities offered for sale.

To assure that certain minimum information about the security is directly in the investor's possession, the Act also requires that a prospectus, which is part of the registration statement and which sets forth the basic nature of the security and its terms, be put in the hands of the investor by the issuer or underwriter of a new security offering by the time he receives his security or any sales literature about it. Again, the investor does not have to read the prospectus or save it. The purpose of the act is simply to assure investors an easily available source of infor-

REQUEST NO. 10 (continued)

mation about the security. Typically, sales of new securities are made on the basis of a telephone call between an employee of the stock broker acting as underwriter and the retail customer followed by a letter confirming his order and enclosing a bill and the prospectus. Consequently, it is often true that the first time a purchaser sees the prospectus is when he is asked to pay for the security he has purchased.

Congress also recognized that the preparation and filing of a registration statement with the SEC in Washington, D. C. could be a long, difficult and expensive task, requiring sometimes months of work and many thousands of dollars and that these requirements might not be practical in the case of small business or corporations or those just being formed and not yet actively in business. In cases where the proposed public offering was relatively small, the expenses and the delays of a full registration statement could make it impractical for such new, small corporations even to offer their stock for sale to the public. In an attempt to solve that problem, Congress authorized the SEC to devise a plan under which a public issue of not over $500,000 could be made without requiring the corporation to file a full registration

REQUEST NO. 10 (continued)

statement. Under the so-called Regulation "A" exemption, the SEC accomplished this by permitting a business to make a public offering of less than $500,000 without filing a registration statement, so long as it filed with the SEC a simpler and more easily prepared statement of its affairs, known as an "offering circular." The offering circular contains some of the basic information that would be contained in a registration statement. The theory of this requirement in Regulation "A" is that the prospective investor will have the opportunity, if he cares to act upon it, of having available to him the basic financial information and a statement about the company's plans, management and operations.

You will notice, however, that the general purpose of the requirements of either a registration statement or an offering circular is to provide the public with access to appropriate information only about certain kinds of transactions. There are three circumstances which must be present before one has to worry about satisfying the requirements of the laws relating to registration statements or offering circulars. First, the subject of the sale must be a corporate "security" as that word is defined in the law. Second, the offer of that security must be

REQUEST NO. 10 (continued)

made to the general public at large. Third, the public offering of the security must be by the issuing corporation or an underwriter or dealer acting on its behalf. Congress did not impose the registration requirements in situations where any one of these three elements is not present.

Finally, even though a security is involved and it is being offered to the general public, the registration or offering circular requirements do not apply unless the sale is by the issuing corporation, or by an underwriter or dealer who had purchased the stock from that corporation with the understanding that it would be resold to the general public. Thus, even a large shareholder in the company, provided he does not control the corporation, who did not purchase his stock with a view towards distribution to the general public, might sell his own stock to the general without filing a registration statement or using an offering circular. Even a person in control of the issuing corporation may also, under certain circumstances, sell without registration. For example:

(a) where the controlling person is

REQUEST NO. 10 (continued)

himself not an underwriter and sells his securities directly without an underwriter to investors who cannot themselves be considered underwriters because of the small size of their purchase; or

(b) where the controlling person makes sales of not more than one per cent of the stock outstanding in any six month period; or, finally,

(c) where the controlling person ceases to be a controlling person, he can then sell without registration provided his original purchase was not made with a view to later distribution.

Of course, persons not in control and not underwriters may nevertheless hold large and valuable blocks of stock and they are free to sell their securities to the public in any manner without registration.

Each of these elements—the existence of a

REQUEST NO. 10 (continued)

"security", the public nature of the offering, and the role of the person making the sale as acting on behalf of the issuer in the public offering—presents difficult questions of law when applied to the case before you, and I shall have more detailed comments to make about each of them later in my charge. I think, however, that what I have said so far may be enough to make more meaningful the statute which I shall now read to you.

Securities Act of 1933, Rule 154; 1 Loss, Securities Regulation 178-351, 455-715 (2d ed. 1961).

REQUEST NO. 11

Registration Provisions

The relevant parts of the statute read as follows: [Portions of the text of Section 5 of the Securities Act of 1933, 15 U.S.C.A. §77e should be read to jury]

The statute also provides that the following three types of transactions are exempted from the requirements of registration"

> "4(1) [First,] Transactions by any person other than an issuer, underwriter, or dealer; [second,] transactions by an issuer not involving any public offering; or [third,] transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction). * * *"

This third exemption is available to dealers so long as the transaction takes place after 40 days, and in some cases 90 days, from the first date upon which the security was offered to the public, and so long as the transaction does not constitute any part of an unsold allotment of securities by the issuer or by or through an underwriter.

Brenner, Selected Jury Instruction Forms in an SEC Criminal Case, 41 F.R.D. 93 (1966)
Securities Act of 1933, § 4, 15 U.S.C.A. § 77d;
1 Loss, Securities Regulation 256-59 (2d ed. 1961).

* * *

REQUEST NO. 13

Definition -- "Issuer," "Underwriter," and "Dealer"

The "issuer" of the securities in this case is, of course, Stern-Haskell, Inc. and not any of the defendants before you or anyone else associated with it. The registration requirements may be applicable not only to sales made directly by the issuer, Stern-Haskell, Inc., but also by its underwriters or dealers. These two classes of persons are very carefully defined by the Act. Whether or not a particular person was or was not an underwriter or dealer depends on the actual circumstances of the case and not on the formalities of any title he may or may not have assumed. Under the Act, an "underwriter" is someone who purchased securities from Stern-Haskell, Inc. or a controlling person of that Company with a view to distribution of those securities, or someone who offered or sold securities for Stern-Haskell, Inc. or who participated directly or indirectly in any undertaking to distribute the securities of that Company, or someone who participated, directly or indirectly in the underwriting of any such undertaking. In order to be classified as an underwriter with respect to the common stock of Stern-Haskell, Inc. acquired by him, the person must have

REQUEST NO. 13 (continued)

purchased them for the purpose of distributing them to the public. If he acquired shares for other reasons, such as investment or speculation for profit, without the intent of making a public distribution of them, then he is not an underwriter and the requirements of an offering circular or registration statement do not apply to him if he later decides to sell the common stock of Stern-Haskell, Inc. securities, even though his later sale may be, in fact, a public distribution. You must therefore focus your attention on the purpose for which the person acquired the stock--whether for public distribution or for other reasons--in deciding whether he is an underwriter and thus subject to the Act's requirements. Of course, a person may acquire the common stock of Stern-Haskell, Inc. at different times for different purposes. A person may thus be an underwriter as to certain securities of Stern-Haskell, Inc. but not as to others, and he need not necessarily be a professional stockbroker.

The reason these definitions are so important to your deliberations with respect to the registration provisions is that unless you find that a particular sale of the common stock of Stern-Haskell, Inc. was made either by the issuer (that is to say Stern-Haskell, Inc.) or an underwriter, then the registration provisions of the Act do not apply.

REQUEST NO. 14

Private Transaction Exemption Applies to both "Issuers" and "Underwriters"

If you find that a sale was made of the common stock of Stern-Haskell, Inc. by the issuer, or someone then acting as an underwriter for the issuer, or as a dealer, you must then decide whether the sale was actually part of a distribution to the general public or was, rather, a private transaction with the particular investor "not involving any public offering." You will recall when I read Section 4 of the Act, 15 U.S.C.A. §77d, to you that the statute simply exempts "transactions by an issuer not involving any public offering." Actually, however, this exemption is equally relevant to underwriters. You will remember that unless the sale is by Stern-Haskell, Inc., itself, or by an underwriter or dealer, the requirement of a registration statement or offering circular does not apply at all, and the owner of the shares may sell them in any manner he pleases. Before a person can be regarded as an underwriter with respect to the common stock of Stern-Haskell, Inc., it must be established that he purchased it as part of a substantial block of the common stock of Stern-Haskell, Inc., which he intended to resell as part of a general public distribution. Thus, not only

REQUEST NO. 14 (continued)

must the block of the common stock of Stern-Haskell, Inc. taken by the underwriter for distribution be substantial, but the sale of the security in question must be part of a public distribution. If you find that a particular sale of the common stock of Stern-Haskell, Inc. fits the description I shall give you of a private transaction, then making that sale was not acting as an underwriter and is therefore not subject to the requirement of a registration statement or offering circular.

Brenner, Selected Jury Instructions in an SEC Criminal Case 41 F.R.D. 93, (1966) H.R.Rep. No. 1838, 73rd Cong., 2d Sess. 41 (1934); Note "Regulation of Nonissuer Transactions Under Federal and State Securities Registration Laws," 78 Harv.L.Rev. 1635, 1639 (1965); Throop, "Some Problems of Exemption Under the Securities Act of 1933," 4 Law and Contemporary Problems 89, 124-125; Orrick, "Registration Problems Under Federal Securities Act," 10 Hastings L.J. 1, 13 (1958).

REQUEST NO. 15

Public
~~Private~~ Transactions

Whether a transaction does involve a public offering is frequently a very difficult question. Even the SEC has never developed a definition of "~~private~~ public offering." In fact, even in 1969, the SEC was not sure of the state of law with respect to spin-offs of the type involved in this case.

Brenner, Instructions in an SEC Criminal Case, 41 F.R.D. 93, 105

REQUEST NO. 16

Defendant's Guilty Knowledge
That the Security Transaction
was not Exempt from Registration

An element which you would have to consider on these registration counts if you found the government has proved beyond a reasonable doubt that the particular defendant in each count had used the mails or an instrument of interstate commerce to make the offer, sale or delivery of the alleged security and had done so at a time or in a manner in which the security was required to be registered is this: Does the evidence establish beyond a reasonable doubt in your mind that the particular defendant then knew that the offer, delivery or sale was of the common stock of Stern-Haskell, Inc., which could not legally be offered, sold or delivered without the filing of a registration statement? Unless the defendant was aware of the applicability of the registration requirements and knew that the particular offer, delivery or sale he was making was not exempt from those requirements, then, even though the transaction might have been unlawful, his own participation in it was not criminal.

In deciding whether or not each defendant knew that the particular transaction described in each of these

REQUEST NO.16 (continued)

registration counts was not then exempt from the registration requirements, it is not, of course, possible for you to peer directly into his mind. You must judge the state of his mind at the time of the transaction by the surrounding circumstances. It would be appropriate for you to consider, for example, his prior experience with the offer, sale and delivery of exempt securities for other corporations, or whether he acted in good faith reliance upon the advice of others more experienced and knowledgeable about the SEC Rules and Regulations. In this connection, it is appropriate for you to consider whether the laws and administrative regulations concerning exemptions which I have described to you--an area of law one court has described as "far from a model of clarity"--are sufficiently complicated, in light of a particular defendant's prior experience, to make it reasonable that he would have relied in good faith on the advice of someone else that the particular transaction was, in fact, exempt. If you find that a particular defendant did so rely upon the advice of another and did believe, at the time of the transaction, that it was exempt from the registration requirements of the Act, then, even if you are now convinced beyond a reasonable doubt that he was mistaken, he is nonetheless innocent.

REQUEST NO. 17

Elements of the Registration Counts

The crimes described by the statutes I have just read to you consist of a combination of elements, each of which must be present before any crime has been committed. A defendant is innocent of the charge in any of the parts of the indictment charging criminal violation of the registration requirements unless you are convinced that each of the following elements of the crime with which he is charged has been proven by the government beyond any reasonable doubt. If any one of the following elements has not been proven to your satisfaction beyond a reasonable doubt, then, even though all of the other elements may be so established in your mind, you must nonetheless find the particular defendant innocent of that charge. These elements are the following:

First: each defendant charged must have directly or indirectly used the mails or instruments of interstate commerce to offer, sell or deliver the common stock of Stern-Haskell, Inc. described in the count in question. Further, the use must

REQUEST NO. 17 (continued)

have been wilful and knowingly in violation of the registration requirements of the Act.

Second: you must be satisfied beyond a reasonable doubt that the security described in each of these counts was subject to the registration requirements of the Securities Act and that neither the security nor the particular offer, sale or delivery was exempt from these requirements under any of the exemptions which I have previously described to yo , such as the private transaction exception, the sale by someone other than an underwriter or issuer exception, or the exception for a transaction involving the issuance of some obligation of Stern-Haskell, Inc. other than a security.

Third: assuming the first two elements have been established beyond a reasonable doubt as to a particular defendant and transaction, his acts nonetheless are innocent acts unless you are convinced

REQUEST NO. 17 (continued)

beyond a reasonable doubt that the defendant knew personally that the particular security and the particular transaction were subject to the registration requirements and knew that they were not exempt from those requirements.

Fourth: and finally, assuming you find each of the foregoing elements of the statute proved with respect to an individual defendant and transaction beyond a reasonable doubt, he is nontheless not guilty of any crime unless you are convinced beyond a reasonable doubt that he acted wilfully and with a specific criminal intent to break the law.

These are the four elements which all must be proved beyond a reasonable doubt with respect to a particular defendant and transaction before you can find him guilty of criminally violating the registration requirements of the Securities law.

Brenner, Selected Jury Instruction Forms in an SEC Criminal Case, 41 F.R.D. 93 (1966).

* * *

REQUEST NO. 38

Good Faith Belief—Future Prospects of the Stock of Stern-Haskell

It has been argued by defendants Wax and Levine that it was their good faith belief that they honestly relied on information provided by others who had access to information with respect to the future prospects of Stern-Haskell, Inc. and that Wax and Levine, in acting on such information, honestly believed that Stern-Haskell, Inc. was a good stock that had appreciation value for the future.

Now, if you find that the defendants Wax and Levine honestly believed that Stern-Haskell, Inc. was a good stock and that it had a reasonable chance of appreciating in value or going up in price and you are, in fact, left with a reasonable doubt, then Wax and Levine would not be guilty of making factual misrepresentations or omitting to state material facts and, therefore, you should acquit the accused.

REQUEST NO. 39

Good Faith Belief—Spin-off

It has been argued by all of the defendants before you that it was their good faith belief that they honestly relied on the independent opinions of various counsel who were either specialists in the securities laws or were, in fact, employed by the Securities and Exchange Commission. The claim is that certain defendants and co-conspirators relied on opinion letters from these counsel and that because of such reliance, certain defendants and co-conspirators proceeded to spin-off the common stock of Stern-Haskell, Inc. by National Ventures, Inc.

Now, if you find that the defendants honestly believed that a spin-off of the common stock of Stern-Haskell, Inc. by National Ventures, Inc. was a legal transaction at that time (April, 1969), you should acquit the accused.

* * *

REQUEST NO. 43

Statute of Limitations

There is a policy embodied by law known as the Statute of Limitations that the Government may not prosecute certain types of alleged crimes after a certain period of time because of the danger that the passage of time will make reliable evidence too difficult to obtain. In this case the Statute of Limitations is five years.

The indictment alleges a conspiracy which began on or about August 1, 1968. The indictment was filed in this case on June 4, 1974. Thus, unless you find that an overt act alleged in the indictment in furtherance of the conspiracy was done by any defendant or co-conspirator on or after June 4, 1969, then you must acquit all defendants.

* * *

REQUEST NO. 45

Prior Similar Acts

During the course of this trial you heard much testimony about the securities of several companies other than Stern-Haskell. Mr. Wohl, in his summation, mentioned these companies and the various other securities in addition to Stern-Haskell. The government pointed out that the purpose of introducing evidence with respect to these other companies and securities was to show that some of the defendants previously engaged in corporate transactions similar to those before the jury in this case. Mr. Wohl's argument was that these prior similar acts would tend to negative any argument that certain defendants did not have the requisite intent.

I have pointed out to you on several occasions during this trial that such evidence of prior similar acts with respect to these other companies and securities is limited to only certain defendants. There is no such evidence that defendants Walter Wax and Lawrence Levine participated in any transaction involving these companies and securities in any way whatsoever, the evidence was not offered against them and I charge you that in your deliberations you are not to consider any such evidence with respect to the other companies and securities, as against defendants Wax and Levine.

REQUEST NO. 46

Inferences - Failure of Government
to Call an Apparently Necessary Witness

The burden of proof is on the prosecution to establish guilt beyond a reasonable doubt. If you find that evidence should have been provided in the form of documents or testimony of a witness to prove a certain point and that that evidence was not provided or the witness was not called you are entitled to draw an inference that had those documents been supplied or had the witness taken the stand the evidence provided would have been adverse to the government's position.

The law entitles you to assume that when an apparently necessary witness is not called by the government to prove a fact which the government maintains is true, that witness would, if called, have testified contrary to that fact and, in effect, against the government's position.

1913a Requested Additional Instruction

74 CR 673 USA -- Robinson, et al.

U.S. DISTRICT COURT FILED MAR 25 1975 S.D. OF N.Y.

Requested Additional Instruction

During the government's final summation Mr. Wohl referred to certain stocks other than Stern-Haskell which Mr. Stein stated he had been criminally involved in, and asked you to draw certain conclusions based on certain records of Lockwood and Company.

That reference was based on a good faith misunderstanding among counsel and the government. We have now cleared it up. And I instruct you that you should entirely disregard Mr. Wohl's comment because it has not been ~~established~~ established, and the government does not contend,

1914a Requested Additional Instruction

that defendants Levine and Wax and Lockwood and Company committed any criminal acts concerning any of those stocks other than Stern-Haskell.

Requested by:

March 22, 1975
6:00 P.M.

Paul J. Curran, U.S. Attorney
by Jack B. Weinstein AUSA.

Thomas F. Gudheim

Morton S. Robson

Walter J. Higgins Jr.

David V. Keegan

pro se —

Gerard P. Conte

Herman Richman

RECEIVED
JAN 22 1975
JUDGE MOTLEY'S CHAMBERS

1915a Kaye's Judgment

United States of America vs.

DEFENDANT: PHILIP KAYE

United States District Court for THE SOUTHERN DISTRICT OF NEW YORK

DOCKET NO.: 74 Cr. 573

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: March DAY: 28 YEAR: 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[ ] WITH COUNSEL CHARLES STILLMAN (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly conspiring directly and indirectly, make use of means and instruments of transportation and communication in interstate and foreign commerce and of the mails to sell securities, to wit, common stock of Stern-Haskell, Inc., at a time when no registration statement as to said securities was in effect with the United States Securities and Exchange Commission. (Title 18, United States Code, Section 371.)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR and ONE (1) DAY

Counts 2,3,4,5,6,7,8,9,10,11,12 and 13 are dismissed on motion of defendants counsel with the consent of the Government.

SPECIAL CONDITIONS OF PROBATION

MICROFILM APR 01 1975

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. DISTRICT COURT FILED MAR 28 1975 S.D. OF N.Y.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

CONSTANCE BAKER MOTLEY

Constance Baker Motley

Date March 28, 1975

(77)

1916a Stein's Judgment

United States District Court
THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT: SIDNEY STEIN

DOCKET NO.: 74 CR. 573

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: MARCH DAY: 28 YEAR: 197

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired t have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL LEONARD GLASS (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged / [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully & knowingly dic use & cause to be used means & instrumentalities of interstate commerce & the mails in furtherance of scheme to defraud.(T.15, Secs 78j & 78ff USC; T. 18, Sec. 2 USC); directly & indirectly caused to be carried by means & instruments of transportation in interstate commerce, for the purpose of sale and delivery after sale of common stock of Stern Haskell Inc., when no registration statement as to such securities was in effect with S.E.C. (T. 15, Secs 77e & 77x USC., T.18, Sec 2 USC,); and conspiracy so to do. (Title 17, Section 371 U.S. Code.)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contra was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on count 1 and fined $10,000.

TWO (2) YEARS ON count 7 and fined $10,000. Prison sentence on counts 1 and 7 to run concurrently with each other.

FIVE (5) YEARS on count 14 and fined $5,000. Prison sentence on count 14 to run CONSECUTIVELY with sentence imposed on count 1.

Total fines of $25,000. to be paid or defendant is to stand committed until the fines are paid or he is otherwise discharged according to law

SPECIAL CONDITIONS OF PROBATION

Counts 2,3,4,5,6,8,9,10,11,12,13,15,16,17 and 18 are dismissed on motion of defendants counsel with the consent of the Government.

MICROFILMED MAR 31 1975

DOCKETED AS JUDGMENT # 25,272 ON April 1, 1975

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on th reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of five years permitted by law, may issue a warrant and revo probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY: [X] U.S. District Judge CONSTANCE BAKER MOTLEY

U.S. DISTRICT COURT FILED MAR 28 1975 S.D. OF N.Y.

Date March 28, 1975

1917a Defendant Rubinson's Exhibit A

TRUETT AND WATKINS
ATTORNEYS AT LAW
SUITE 822 BISCAYNE BUILDING
19 WEST FLAGLER STREET
MIAMI, FLORIDA 33130
TELEPHONE 373 5537

TALLAHASSEE OFFICE
THE TITLE BUILDING
TALLAHASSEE, FLORIDA 32301
TELEPHONE 224-1259

July 9, 1968

USA 33[illegible] RUBINSON
(ED. 4-23-71)

Mr. Larry L. Hochen
The Four Ambassadors
801 South Bayshore Drive
Miami, Florida

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

A =id.

Re: Spin-off Stock Dividend of Calculator Computer Leasing Corp.
(Allen Electronic Industries, Inc.)

Dear Mr. Hochen:

You have inquired of us as to your position with reference to being able to dispose of the stock dividend declared by Allen Electronic Industries, Inc. of its wholly owned subsidiary Calculator Computer Leasing Corp., which dividend and spin-off has been properly declared in accordance with the Securities Exchange regulations, and its possible effect considering the fact that these dividends have been given to you as a stockholder of investment shares of Allen Electronic Industries, Inc., that are not registered.

You further advise that the shares of stock held by you in Allen Electronic Industries, Inc. were obtained in consideration of services you performed for this corporation, together with monies represented by a promissory note to make up the difference so that the cost to you of the original Allen Electronic Industries, Inc. shares were the same as they were to others. However, you informed us that these shares of stock have not been registered as yet.

You further advise that you hold no position in Allen Electronic Industries, Inc., either as an officer, director or shareholder whose number of shares can affect the assets of the corporation, or its policies or the value of its remaining stock, and that your holdings are both actually and theoretically negligible in any and all respects.

You further advise that the spin-off stock of Calculator Computer Leasing Corp.

1918a Defendant Rubinson's Exhibit A

has been apportioned one for one to all stockholders of Allen Electronic Industries, Inc. in the nature of a stock dividend.

You requested us to advise you concerning whether or not there are any restrictions on your disposing of your spin-off stock dividend of Calculator Computer Leasing Corp. under the circumstances as above mentioned.

We have checked the regulations, cases and have also discussed the question with representatives of SEC here in Miami. We have not been able to find any cases which indicate that under the above mentioned circumstances you have to treat the spin-off dividend in the same manner as the original non-registered investment stock.

From all that we can learn and from all information available to us based upon your foregoing statements it would appear that there is no lawful reason why you cannot dispose of this stock given to you in the nature of a dividend in the same manner as any other bona fide holder of registered Allen stock who may receive the spin-off stock dividend the same as you. It would not appear that the restrictions or disqualifications, if any, which might appertain to the Allen Electronic stock would in any way affect the disposibility of the Calculator Computer Leasing Corp. stock you have received in the nature of a stock dividend based upon all the information we have been able to obtain and furnished to us by you.

We trust this answers your question and if there are any further questions, please do not hesitate to call upon us for the same.

Very truly yours,

TRUETT and WATKINS

HH/E

By /s/ Harold Heller
HAROLD HELLER

1919a Defendant Rubinson's Exhibit B

GERMAISE

DEFENDANT

USA 33s - 475
(ED. 4-23-71)

FEB 19 1975

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
B =ud

November 18, 1968

Frank Freeman, Esq.
800 Ainsley Building
Miami 32, Florida

Re: Calculator-Computer Leasing Corp.
With General

Dear Frank:

As I reported to you on the telephone last week, the Regulation A Section of the New York regional office of the SEC is of the opinion that there is no necessity for the registration of the shares of General which are contemplated for distribution by Calculator to its shareholders in the form of a dividend. Moreover, Mr. Goldberg, an attorney in the Section of Small Issues advises: "Not only is it unnecessary to register the shares, there is no method by which the same may be accomplished inasmuch as there is no issuer." A distribution of shares by a corporation to its shareholders by way of a "liquidating dividend" is not a "sale" as such term is defined by the Act (1933) and such a transaction would not require registration or qualification.

I have researched the matter and as I stated to Norman Rubinson and to your client some months ago, "No registration or qualification, even the [illegible],000 Notice filing, would be required." The Section of Small Issues supports my initial view and, as a matter of fact, Mr. Goldberg reported to me that he discussed this problem with the entire Section, including those who have been with the Commission since its inception and are fully conversant with the requirements of situations such as the one just hereof.

It is my advice to Mr. Rubinson and to the Board of Directors of Calculator-Computer that the shares of General be immediately turned to the Calculator shareholders.

Hoping to see you upon your next visit to New York.

Yours very truly,

Irwin L. Germaise

ILG:RS

1920a Defendant Rubinson's Exhibit F

DEFENDANT RUBINSON

FRANK E. FREEMAN
ATTORNEY AT LAW

SUITE 1400 AINSLEY BUILDING
14 NORTHEAST FIRST AVENUE
MIAMI 32, FLORIDA

TELEPHONE 371-7681

MAR 7 - 1975

ALLEN CAPITAL CORP Field

May 8, 1969

Dear Sir:

We note that you have sent through for transfer certain stock certificates of General Auto Parts Stores, Inc. In the original letter of Opinion from Mr. Irwin Germaise, attorney, in which Mr. Germaise expressed his opinion that certain shares of General Auto Parts Stores, Inc., owned by Calculator Computer, Inc. could be distributed, he stated that there was some doubt as to whether or not the shares received by officer and directors or control parties of Calculator Computer, Inc. were to be received for investment purposes only. In view of this letter, it will be necessary for you to forward General Auto Parts Stores, Inc., the following:

1. A letter of Opinion from a duly licensed attorney as to the tradeability of the shares you wish to transfer.
2. A statement from you under oath, setting forth whether or not you were an officer, director, or control person of Calculator Computer at the time the distribution of General Auto Parts Stores, Inc. shares was authorized and/or at the time you received same.
3. In addition, this statement should contain information as to how long you have held your shares of Calculator Computer, how many shares of Calculator Computer you own and the number of shares that Calculator Computer had outstanding at the time of distribution of General Auto Parts Stores, Inc., stock.

I should greatly appreciate your immediate attention to this matter so that we may accommodate you in your transfer.

Very truly yours,

Frank E. Freeman,
Attorney for
General Auto Parts Stores, Inc.

FEF/rs

Gerald Tiddlbaum President
General auto Parts Stores, Inc

[¶ 3054] [Registration of Shares]

Following receipt of the foregoing advice, a registration statement was filed on Form S-1 to cover the shares issuable in consummation of the merger. The prospectus included in the registration statement consisted essentially of the information contained in the definitive proxy statement of the surviving company which had been prepared previously in accordance with the Commission's proxy rules (Regulation X-14 under the Securities Exchange Act of 1934) and which had been forwarded to security holders of the surviving company in connection with the solicitation of proxies to be voted upon the plan of merger. Upon request of the issuer, the Commission, acting under Section 8(a) of the act, declared the registration statement effective.

This release becomes effective October 8, 1957.

[Release No. 33-3846, October 8, 1957, 22 F. R. 8361.]

[¶ 3055] Application of the Securities Act of 1933 and the Securities Exchange Act of 1934 to Spin Offs of Securities and Trading in the Securities of Inactive or Shell Companies

Release Nos. 33-4982 and 34-8638, July 2, 1969, 34 F. R. 11581.

17 CFR 231.4982 (241.8638).

The Securities and Exchange Commission today made publicly known its concern with the methods being employed by a growing number of companies and persons to effect distributions to the public of unregistered securities in possible violation of the registration requirements of the Securities Act of 1933 and of the anti-fraud and anti-manipulative provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The methods employed can take and in fact have taken a variety of patterns.

I

Frequently, the pattern involves the issuance by a company, with little, if any, business activity, of its shares to a publicly owned company in exchange for what may or may not be nominal consideration. The publicly-owned company subsequently spins off the shares to its shareholders with the result that active trading in the shares begins with no information on the issuer being available to the investing public. Despite this lack of information, moreover, the shares frequently trade in an active market at increasingly higher prices. Under such a pattern, when the shares are issued to the publicly-owned or acquiring company, a sale takes place within the meaning of the Securities Act and if the shares are then distributed to the shareholders of the acquiring company, that company may be an underwriter within the meaning of Section 2(11) of the Act as a person "who purchased from an issuer with a view to . . . the distribution of any security" or as a person who "has a direct or indirect participation in any such undertaking."

While the distribution of the shares to the acquiring company's shareholders may not, in itself, constitute a distribution for the purposes of the Act, the entire process, including the redistribution in the trading market which can be anticipated and which may indeed be a principal purpose of the spin off, can have that consequence. It is accordingly the Commission's position that the shares which are distributed in certain spin offs involve the participation of a statutory underwriter and are thus, in those transactions, subject to the registration requirements of the Act and subsequent transactions in the shares by dealers, unless otherwise exempt, would be subject to the provisions of Section 5 requiring the delivery of a prospectus during the forty or ninety day period set forth in Section 4(3).

The theory has been advanced that since a sale is not involved in the distribution of the shares in a spin off that registration

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is not required and that even if it is required, no purpose would be served by filing a registration statement and requiring the delivery of a prospectus since the persons receiving the shares are not called upon to make an investment judgment.

This reasoning fails, however, to take into account that there is a sale by the issuer and the distribution thereafter does not cease at the point of receipt by the initial distributees of the shares but continues into the trading market involving sales to the investing public at large. Moreover, it ignores what appears to be primarily the purpose of the spin off in numerous circumstances which is to create quickly, and without the disclosure required by registration, a trading market in the shares of the issuer. Devices of this kind, contravene the purpose, as well as the specific provisions, of the Act which, in the words of the statutory preamble, are "to provide full and fair disclosure of the character of the securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof." In the circumstances of a spin off, when the shares are thereafter traded in the absence of information about the issuer, the potential for fraud and deceit is manifest.

This release does not attempt to deal with any problems attributable to more conventional spin offs, which do not involve a process of purchase of securities by a publicly-owned company followed by their spin off and redistribution in the trading markets.

II

Another pattern has come to the Commission's attention in which certain promoters have acquired corporations which have ceased active operations, or which have little or no assets ("shell corporations"), and which have a substantial number of shares outstanding, generally in the hands of the public. Thereafter the promoters have engaged in activities to quickly increase the market value of their shareholdings. For example, in some cases promoters have initiated a program of acquisitions, transferring assets of dubious value to the "shell corporations" in exchange for substantial amounts of newly issued shares. This activity is frequently accompanied by publicity containing exaggerated or misleading statements and designed to stimulate interest of public investors in the company's shares in violation of the anti-fraud provisions of the Securities Exchange Act of 1934. Thereafter the market prices of these securities have risen sharply under circumstances which bear no relationship to the underlying financial condition and business activities of the company. In some of these cases the promoters or other corporate insiders, take advantage of the market activity and the price rise which they have generated, have sold their shares at the inflated prices to the public in violation of the registration and anti-fraud provisions of the Federal securities laws. Similar activities have also been noted in a number of cases involving shares which a publicly held company has spun off to its shareholders.

III

The activities discussed above generally can only be successfully accomplished through the efforts of brokers and dealers. Accordingly, brokers and dealers are cautioned to be particularly mindful of their obligations under the registration and anti-fraud provisions of the Federal securities laws with respect to effecting transactions in such securities. In this connection, where a broker or dealer receives an order to sell securities of a little-known, inactive issuer, or one with respect to which there is no current information available except possibly unfounded rumors, care must be taken to obtain sufficient information about the issuer and the person desirous of effecting the trade in order to be reasonably assured that the proposed transaction complies with the applicable requirements. Moreover, before a broker or dealer induces or solicits a transaction he should make diligent inquiry concerning the issuer, in order to form a reasonable basis for his recommendation, and fully inform his customers of the information so obtained, or in the absence of any information, of that fact.

In the foregoing connection the Commission also calls attention to its release dated February 2, 1962 on the subject "Distribution by Broker-dealers of Unregistered Securities" (Securities Act Release No. 4445, Securities Exchange Act Release No. 6721 [¶ 22,753—22,759]).

[Release No. 33-4982, July 2, 1969, 34 F. R. 11581.]

1923a Defendants Wax and Levine's Exhibit J

MEDICAL EVALUATION

FILED
OCT 31 1972

Dr. J. R. Richardson, Jr. 10-12-72

STEIN, Sidney Case No. 50101

This 46 year old broker was admitted to the Highland Park General Hospital at 10:30 P.M. on 10-12-72, after having taken 8 Dalmane capsules. He promptly vomited and vomiting occurred several times. However, he was quite lethargic and had slurred speech and staggering gait. Thus, he was admitted for observation and treatment.

The most important part of the patient's history has to do with his psychiatric illness, and details have been given elsewhere in this record.

The patient is quite lethargic, and a detailed medical history is difficult to obtain. He is especially uncertain about time intervals. However, the following information seems to be reasonably reliable.

He had the usual diseases and a tonsillectomy in childhood. Many hears ago he was told that he had a heart murmur. There is no history to suggest rheumatic fever. He was classified as 4-F for military service, apparently because of his psychiatric history. About 10 years ago, he had a right inguinal hernia repair at the Long Island College Hospital in New York. Also about 10 years ago he had gross hematuria and had cystoscopy by a Dr. McKenzie, here in Miami. He was told that this was due to prostatitis. There was no recurrence. For the past 6 years he has been troubled with a recurring eruption on the penis. This has been attributed to herpes. He has tried various medications with dubious results. This seems to be one of his most troublesome problems.

Three or four years ago he was involved in an automobile accident in New York. He believes he was unconscious for some 4 to 6 hours. He was hospitalized in New York for 2 or 3 days and then transferred to Mt. Sinai Hospital in Miami Beach where he was hospitalized for another 2 or 3 days. There were no fractures or serious external manifestations.

He has been bothered with constipation and occasional blood in the stool for 5 or 6 years. Occasionally the stool had been black in the past. About a year and a half ago, he was hospitalized at Mt. Sinai on Miami Beach where he had extensive investigations which showed nothing abnormal. He has been bothered with occipital headaches for many years, and has been told to take Tylenol rather than aspirin because the latter caused gastric irritation and possible bleeding.

Continued . . . . .

For the past 4 or 5 years, he has had low blood pressure. His blood pressure has been around 110 systolic.

For the past few days he has been bothered with tingling in the fingers of the right hand. This is relieved by massage.

The patient's mother died when she was in her early sixties of heart disease. This was believed to be related to rheumatic fever but she also had hypertension. His father died of carcinoma of the prostate at about 75.

The patient's 54 year old brother recently had valvular and cardiac arterial surgery. He has a 52 year old brother and a 56 year old sister who are well.

The patient had been married once and has 1 child who is a 20 year old daughter in good health. The patient's wife has had multiple medical and surgical problems.

The past history and review of systems are otherwise unremarkable, but due to the patient's somulent state, another review at a later time would be in order.

Weight is estimated at 160 lbs; pulse is 62 and regular; B/P is 100/70 in both arms with the patient in the supine position. Respirations are quiet.

He is lethargic and it is difficult to maintain his attention. Earlier he had been crying almost constantly. HEENT unremarkable. The pupils are small but react to light. The fundi were difficult to visualize, but the discs could be seen and there is no papilledema. The thyroid is not enlarged. No masses are felt in the neck. The chest is resonant. Lungs are clear. The heart is not enlarged. Rhythm is regular. Heart sounds are good. There is no splitting. A grade II systolic murmur is heard in the second and third intercostal space, slightly louder with the patient in the supine position. No organs or masses could be felt in the abdomen. There is no tenderness nor distention. He has a right inguinal scar. Genitalia are normal. The femoral, dorsalis pedis and posterior tibial pulses are good. He has no edema. There are no abnormalities of the joints. He has no enlarged nodes or skin lesions.

IMPRESSION:
1. Severe depression.
2. Recurring herpes genitalis.
3. Functional cardiac murmur.
4. R/O peripheral neuropathy involving the right hand.

ADDENDUM: Examination of the prostate and rectum are normal.

Continued . . . .

1925a Defendants Wax and Levine's Exhibit J

MEDICAL EVALUATION

PAGE 3

STERN, Sidney Case No. 50101

Hemoglobin is 15.3; hematocrit 42.5; WBC 8,100, differential is normal. Urinalysis is normal. VDRL nonreactive.

I will continue to follow up on the medical aspects of Mr. Stern's case as required.

J. R. RICHARDSON, M. D.

JRR:jh - 10-21-72

DCX-G

~~1926a~~ Defendant Chester's Exhibit G

Re: S. Stein 2/18/75

Date 2/14/75
Place U.S. Ct House, R3002
Present Sidney Stein
T.P.D

Re: Securities traded in from 1968 to present

Applied Concepts Corp.
formerly Palm Developers.

American Foods
Atlantic Industries
Allen Electronic
Allura Fashions
Atlantic International
Acute Industries
Associated Foods.
Alleon Industries (A.C. Kluger)
American Plan Communities
Arizona Bio Chemical

Busche Hurd
Building & Land Developers
Boston & Maine R.R. Corp.
Basic Foods
Bonfield Building
Blank Equipment Leasing
Computerized Knitting
Charnita
Cadillac Knitting
Carnaval International
* Casadela
Colonial Foods

1927a Defendant Chester's Exhibit G

Cabot Knitting
Calculator Computer Leasing

Domelite (Washington Wig)
Free Trading
Diversified Metals
Florite
Forum Industries
First Investors Life Insurance Co.
Distant Industries
Electro Ed Industries
* Forward Industries (AC Kluger)
Fuqui Itempo
Empire Stores
Essex Industries
Gluckin
General Auto
* House of Knitting
Instrument Systems
Information Computer
Import Motor Parts
Lomic Industries
Imperial Land Industries
* Minute Approved (A.C. Kluger)
Motel Managers
Master Craft Medical Industrial
Norwyn Publishing Corp.
Naya Industries
Newport General
National Luggage

1928a Defendant Chester's Exhibit G

Omega Equities

Recon
Radio Hill Mines
Royal Credit
Sandra

Thermaline Industries

~~Transportation~~ Communication Corp
Trans World Attractions

* Viking Mineral

Weisberg
Allan Wood Industries Steel

Young Design

Rubinson's sentence
5/15/75

THE COURT: All right, Mr. Rubinson, you are now before the Court for sentence, having been convicted after a trial by jury of Counts 1 and 14 of indictment 74 Cr. 573.

Now, for the first count, the law provides a term of imprisonment up to five years and a fine up to $10,000.

With respect to Count 14, the law provides a term of imprisonment up to five years and a fine up to $5,000.

Do you wish to make a statement in your own behalf at this time or to say anything as to why these maximum penalties provided by the law should not be imposed in your case?

THE DEFENDANT: Yes, Ma'am.

Your Honor, I would like to say that, as Mr. Andrews pointed out, that this happened in 1969. I've suffered for five, six years now, been in court constantly, started with the Radio Hill because of Weitzman and Stein.

I've been on perjury because I reiterated what Mr. Stein said said and it came out at the trial. What he said to Mr. Weitzman, I don't remember talking to Mr. Weitzman. I went to court without a jury, two-day trial, and the Judge found me guilty and fined me $2,000.

I suffered there, and I suffered in this particular Florette case, that I went to jail for that.

THE COURT: How much time did you spend in jail on the Florette case?

THE DEFENDANT: He gave me six months, and after two months he stopped the sentence and put me in the Halfway House, which was still part of the sentence, and I still, although I'm through with the Halfway House, I still help them. I talk to the young people, I go to their meetings. They ask me to participate, because I was the oldest one in the house,which I do.

And I think for the last five years being in court and being constantly surveilled and gone.through, I've really suffered. I know my family has suffered, and I just beg the Court to be lenient.

THE COURT: All right.

It is the judgment of the Court that the defendant be sentenced to a term of three years on Count 1 and a concurrent sentence of three years on Count 14.

Is there a motion -- well, he was acquitted on the other count.

Is there anything further?

The defendant is remanded.

MR.ANDREWS: If it please the Court, may I address

the Court with respect to the remand? And I thank you for the sentence, your Honor.

THE DEFENDANT: Could I talk to my wife for a minute?

THE COURT: Yes, you may.

MR. ANDREWS: If it please the Court, may I be heard on the question of the defendant's remand?

THE COURT: Yes.

MR. ANDREWS: Judge, throughout Mr. Rubinson's difficulties with the courts there is one thing that he has demonstrated, and I think he demonstrated it well to your Honor, he does come back to court, he comes and follows the directions of the Court. He neverwas even late for trial, even one day throughout that long trial that your Honor conducted.

Before Judge Weinstein he was released in his own recognizance after sentence for 90 d··s to permit him to be with his family and straighten out his affairs before he surrendered, and he surrendered voluntarily without bail being imposed him at all, and Judge Weinstein even saw fit not to restrict the territorial boundaries of his release.

Throughout this trial he has been released virtually in his own recognizance on the $20,000 personal

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recognizance bond.

THE COURT: If you are making an application for bail pending appeal, you are going to have to write that out. You are also going to have to write out the grounds for the appeal. We do not grant bail willy-nilly pending appeal. You have to show some substantial grounds for the appeal.

MR. ANDREWS: I understand that, Judge.

THE COURT: And I will rule on that motion then.

MR. ANDREWS: I understand that, your Honor. I would ask your Honor to consider the post trial motion and the grounds set forth therein as the basis.

THE COURT: I have already denied those motions.

MR. ANDREWS: Those set forth adequately the grounds we intend to rely upon for appeal and we think they have merit, and we ask your Honor to reconsider that in the role now of passing on their merit with respect to what the Court of Appeals will think about them.

The reason why, under the law the other thing you ought to consider is his propensity to return. This man is not going to run away, Judge. The government has his passport. His grandchildren live around the corner from him. He sees them every day, he lives at home with his wife. His daughter lives at his home with him. He has

been in the same house for 25 years.

There's absolutely no indication. He supports his mother who is dying of cancer to the best -- as best he can. She's an old lady. She lives right in practically the shadow of this courthouse and she's dying.

There's just absolutely no indication that he will flee, Judge, and I just implore you to let him be out on appeal so that he can work with me on his appellate papers.

I didn't represent him during the trial. I was there, I have a sense of what it is about, but my attention was riveted on other people and I need to work with him to prepare his appellate papers.

I do have -- would your Honor please reconsider continuing him as he has been until this moment? He appeared -- we knew how your Honor felt about the case from what you had done with Stein. We knew that your Honor took the case seriously. In the interim he has been busy working with his lawyers to take an appeal, not busy running out of the country or running away from the Court. He intends to stand and fight, Judge. And he will be here. He can't appeal as a fugitive.

We have prepared also, your Honor -- Mr. Grimes reminds me -- we've prepared a notice of appeal. We have intended to file it. We set forth some 25 grounds,

dhbr 6

I believe, as points for appeal from Mr. Rubinson. We've spent hours and hours and hours working with the record and with Mr. Rubinson and researching the law on his appeal, Judge. We're serious about this,and so is he.

And as an officer of the Court, I can tell you, having met his family and having spent many hours with him now, it is my opinion that he will not flee. The probability of that is just so remote as to be nil, your Honor.

THE COURT: Well, I will read over his motion again in light of the motion now made for bail pending appeal and rule on that later.

But I think that, as you pointed out yourself, Mr. Andrews, one of the purposes of sending people to jail is hopefully to deter other people from similar conduct.

Now, the world, as I see it, is filled with Norman Rubinsons, people who think they can go through life ripping other people off, so to speak, and not having to pay any penalty for that kind of conduct.

So that in sentencing Mr. Rubinson to jail it is my expectation that other people who feel they can be engaged in similar conduct willbe deterred from this kind of activity.

Now, it is my understanding that a defendant sentenced to a term of imprisonment of three years is

eligible for parole after he has served one-third of his sentence.

Mr. Rubinson has been convicted before for perjury involving and being involved in other similar stock manipulations. This is not his first offense, and as I have said, this kind of conduct is too frequent and there must be some way to deter people from doing it. One way is by sending those involved in such conduct to prison. That is the purpose of the sentence.

MR. ANDRES: I agree that your Honor's purpose is noble.

THE COURT: That is all, gentlemen. I will rule on the motion later.

MR. ANDREWS: May I file the notice of appeal now, your Honor?

THE COURT: Yes. I want to advise you, Mr. Rubinson, of your right to appeal. Your lawyer has already mentioned that he intends to do so and that he has been retained for that purpose at the beginning. Do you recall that?

(No response.)

THE COURT: I am advising you of your right to appeal, although your lawyer has already told me from the beginning that he has been hired by you for the purpose of

taking an appeal.

So I have the duty to advise you of your right to appeal, and if you cannot afford a lawyer to take the appeal the Court will appoint one for you. But obviously you can afford one. You just employed Mr. Andrews for that purpose.

MR. ANDREWS: Your Honor, well, there's more to it than that. I don't want to mislead the Court. Mr. Rubinson has retained me because he is my client. He has engaged my services. In that sense, he has retained me.

The retainer -- my fee has been paid and is guaranteed by another person who is a friend of Mr. Rubinson. I have received no payment from Mr. Rubinson, your Honor.

THE DEFENDANT: I'm working, Judge.

THE COURT: In any event, he has been advised of his right to appeal.

MR.ANDREWS: May I make this one additional request without overreaching?

Would your Honor consider permitting Mr. Rubinson to be released with me and his wife until you make the determination of whether or not you would reconsider a remand, just so he can have a little bit more time with his wife?

THE COURT: Well, he can see his wife while I am

dhbr 9

ruling on this, which will be later this afternoon.

MR. ANDREWS: Thank you, your Honor. We will remain in or about the courthouse and in touch with your chambers. Thank you.

MR. WOHL: Your Honor, I just would like to make one thing clear on the record, and that is that we do not have Mr. Rubinson's passport. He was directed to turn over his passport but he sent us a letter saying that he had lost his current passport.

THE DEFENDANT: Your Honor, we explained that after the trial, that my wife -- if you recall you asked, before the trial started, and told me to call my wife and she looked for that. I told you it was in Miami.

In the interim, while I was incarcerated, I had this office or hotel, and they took away the furniture. We explained that the last time, and my wife was sitting here before -- she, I think, explained that, too. I don't remember whether she got up or not, but that was explained and we have a letter from the passport division in Washington that we notified them of the lost passport.

MR. ANDREWS: It is my experience, your Honor, that the government does have at all ports of debarkation such a list of expired passports and it would be impossible, I think, Mr. Wohl, for Mr. Rubinson to travel on that

dhbr 10

passport. It is true it is lost and of no value.

THE COURT: We do not have to take that up at the moment. He is in the custody of the marshal. He could see his wife in the marshal's office until I rule on his motion.

THE DEFENDANT: Your Honor, may I say one thing before you close? I didn't know if Mr. Andrews brought it up. I would like to talk to him for one moment.

(The defendant confers with counsel.)

MR. ANDREWS: Your Honor, my client wishes me to make one further application -- it would be very brief.

Would your Honor consider, in view of the fact that the defendant does live in Florida and all his family is there, directing that he be incarcerated in Egland Air ForceBase under an A-2 sentence. Egland Air Force Base is the federal prison for that area, Judge. And I think it is appropriate, an appropriate prison under the 3-year sentence that you have imposed. This way his family can get to see him.

THE COURT: We can do that, yes, but it will not be an A-2 sentence.

MR. ANDREWS: But your Honor will direct that he be incarcerated at Egland?

MR. WOHL: I would oppose that, your Honor.

The federal -- the Bureau of Prisons has various guidelines as to where people are supposed to be incarcerated. I don't think -- it may work out that Egland Air Force Base is the place where he happens to be, but I think that the Bureau of Prisons should be allowed to make that determination.

THE COURT: We can only make a recommendation, anyway. The Attorney General is not bound by any recommendation we make with respect to place of incarceration. But it does provide on this form, I believe, Mr. Wohl, which we make out at the time of sentence, setting forth our reason for sentence and our comments with regard to parole, it does indicate that the Judge can recommend --

MR. WOHL: All right, your Honor. We do not oppose that.

THE COURT: -- an institution.

MR. WOHL: I just did not think it would be proper to have it in the form of an order.

MR. ANDREWS: I believe the Courts have made such orders and they've been followed when there is a basis, and here there is clearly a basis, your Honor.

THE DEFENDANT: I would appreciate that very much.

THE COURT: All right.

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AFTERNOON SESSION

3:00 p.m.

THE COURT: Mr. Rubinson?

MR. ANDREWS: Yes, your Honor.

THE COURT: I gather we are to take up your application now for bail pending appeal.

MR. ANDREWS: If it please the Court, yes, your Honor.

THE COURT: Let's see. I went over that motion. Yes, I have reviewed again during the lunch hour the application or motion, post trial motion, filed on behalf of the defendant Rubinson.

MR. ANDREWS: I would add only this, your Honor, if I may address the Court:

We've had a very short time in which to work with Mr. Rubinson, and because of the distances that separated us during the period I would have to say that this is the best we have been able to come up with at this time with respect to representing him on appeal, and these are the points that we've been able to glean from the record now.

I can't really represent to the Court that this is all we would present in his behalf. These are the things I recall mostly frommy own recollection of what happened

dhbr 13

at the trial as being the main points. And I truly haven't had an opportunity to work closely with Mr. Rubinson at all, and this is one of the paramount reasons why I requested he be released in this interim period which in this circuit is rather brief, as your Honor well knows.

THE COURT: This circuit is what?

MR. ANDREWS: It's rather brief. Appeals come on to be heard very rapidly in this circuit, your Honor.

THE COURT: Well, with respect to his claim now that he should be appointed counsel, the government, as you know, has submitted an affidavit setting forth further information regarding Mr. Rubinson's financial ability, showing that during the trial he stayed in a hotel in New York at the rate of what, $52 a night?

MR. ANDREWS: For a few days, your Honor, while he located himself. He then moved to a residence hotel with a kitchen where his wife did the cooking, and I think that cost him $200 a week, and I don't know that you can stay anywhere in New York any cheaper than that.

THE COURT: You don't?

MR. ANDREWS: Well, for a short period of time, Judge, I don't know that you can. He had his wife with him.

THE COURT: That just goes to Mr. Rubinson's

usual conduct of saying on the one hand he has no money and on the other hand he is staying in hotels where he pays $200 a week.

MR. ANDREWS: Judge, I think -- I worked it out with him.

THE COURT: You have to make a lot of money to pay $200 a week.

MR. ANDREWS: Judge, I worked it out with him --

THE COURT: In addition, as this affidavit points out, he apparently is employed by Jaragua Cassine.

MR.ANDREWS: No, Judge.

THE COURT: What is that, Santo Domingo?

MR. ANDREWS: I found out about it this morning. As your Honor knows, I got these papers this morning. I think they're a little bit after the fact. If the government had been serious in its opposition, they should have done their research, I think, at the time when your Honor made the initial determination.

They presented no evidence whatever. They now, I think, maybe take the claim a little more seriously so they have come out with some of the really most outrageous kinds of things. I can explain, for example, one, no hotel in New York or a hotel in New York wants to know and asks on their registration card whether or not there is a business

dhbr 15

affiliation.

At the time Mr. Rubinson was representing, and he told the Court that he was working as a travel agent. If he was working as a travel agent representative of the hotel whose name appears on that registration card at the hotel he stayed at in New York.

THE COURT: During the trial didn't it come out that he had some investment, some airline or something?

MR. ANDREWS: That was another venture, your Honor. In these few years that have elapsed, the most recent few years, Mr. Rubinson attempted, I think, three business ventures, three attempts to make money. One, he and his son tried to run a hotel or a motel in the Miami Beach area and it was a total disaster. Financially the thing closed down; he lost everything he had.

He affiliated with a travel agency in an attempt to earn a living there. After all, what does a man do at fifty-two years of age who has no practical training, who's been in his own business all his life? He couldn't find a job. He worked as a travel agent, he never got a dime's worth of commission for any of the work he did.

He was a representative of this hotel in the Miami area where he lives, and never was able to apparently get anybody to stay in the hotel. So he never made any

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money.

There was another business venture --

THE COURT: Let me ask you about this: Do you dispute Michael Hudaharris' description of Mr. Rubinson's home?

MR. ANDREWS: I have seen Mr. Rubinson's home. I would have to refresh my recollection as to the description, Judge. But it's nothing spectacular.

THE COURT: Is that Rubinson's home, what Mr. Wohl has described in the affidavit?

MR. WOHL: That's correct, your Honor.

MR.ANDREWS: I suppose it's a ranch house in the sense it's all on one floor.

THE COURT: And all on a private island with other expensive homes and expensive cars and houses owned by some corporation of which his son is president?

MR.ANDREWS: No, Judge.

THE COURT: Do you dispute all that?

MR. ANDREWS: His house for twenty-five years was owned by him. There reached a period of time when Mr. Rubinson's personal life and his conduct of his personal life reduced him to something of a shadow of what he had been, and by that I mean alcohol, by that I mean staying away from his family. These are all facts that are documented.

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By that I mean he lost everything he had. This was moved into his wife's and daughter's name in an effort to preserve something for them.

That's why it's not uncommon, your Honor. This house is not spectacular. It has four bedrooms. I've been to it. I was in Miami Beach on other business. I visited Mr. Rubinson's home and his son's home and met his grandchildren to whom he is devoted, and whom he takes care of and sees on a daily basis.

It is not a private island. You know, they would have you believe with this incredible innuendo -- I drove on to that island, no one stopped me, no one asked me where I was going, what I was doing. There are hundreds of families that live on the island. They have a real estate association, just like they have on my block in the upper west side of Manhattan. We employ a guard. Does that make me a wealthy millionaire? We have to because the police of the city can't protect us.

There is a little old man about seventy-five sitting in a little tiny gate house alongside of the road that leads out onto this island. It's public property. It's part of the city of Miami. And the tenants' association or the real estate owners' association, of which Mr. Rubinson is not and has not for years been a member, employs this

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little old man. Presumably in case he sees someone who looks suspicious coming on the island to call the city police. I can tell your Honor as an officer of the court I was not detained, stopped, questioned or anything else.

His house, and I will have to say it, is not in good condition. It is run down, it is shabby, it is not expensively furnished or appointed.

If the government really wanted to come in and give your Honor something tangible and concrete, let them go out and hire and expert and have him appraise it and evaluate the title and see how much equity is there and see how much the real estate market in Miami, which is utterly depressed, would bring for this house.

THE COURT: That is in the affidavit, isn't it?

MR. ANDREWS: I can tell your Honor, as a matter of my own knowledge from other clients in the area, the real estate market in Miami is a total disaster. There are literally thousands of apartments going unoccupied and unsold. There are houses all over the market. It's a buyer's paradise.

It's not waterfront property. You can't see the water from Mr. Rubinson's house. It is not luxurious, it is on a small plot of land. It's a conventional middle-class home.

They come in here with these wild kinds of statements, unsupported by any kind of real evidence, and I think mislead the Court. This is not a man of means, your Honor.

THE COURT: Well, I do not think we can attribute much credibility to the statements made by Mr. Rubinson. He could have furnished an appraisal himself.

MR.ANDREWS: Judge, that would have cost money and I do not think the $100 that it would cost to bring an appraiser in to show comparables, to review the house, if you culd get one to do it for $100, would have been money well spent in his predicament. I know what it cost him to come to New York and try this case. I believe the venue is improperly laid in New York. This is a Florida case, and so did the SEC believe it was a Florida case when they sent it to the Florida United States Attorney. It was only then they decided they would rather try it in New York.

Thus, Mr. Rubinson had to relocate to the City of New York with his family. He didn't go out and dine lavishly here. He and his wife took a little apartment in a fourth-rate hotel, which is what that hotel is on 38th off Park Avenue, with a little cooking facility, and they cooked there and they bought their food in a

supermarket. It cost $200 a week, I believe, or something in that vicinity, but you really just can't live very much cheaper. You can't rent an apartment. It cost you 250 for a studio, and they won't rent it to you by the week, Judge.

A man in his predicament really can't live much cheaper in the City of New York. We figured it did cost him, and we went through it, $2500 to come to New York to be here for the nine or ten weeks that it took to try this case. That's a far cry from what it would cost to hire a competent attorney to represent him at this trial.

And I'm serious, Judge, I'm saying a minimum of $35,000, and that's what the reality is today. You go to anybody competent to try a federal securities case in the Southern District and tell them it's going to go eight or nine weeks, you're lucky he'll take the case, one. If he will, he will want in advance some 35 or $40,000. And that's what the condition is within the legal community in the City of New York today.

Now, against that the government offered, I think, your Honor, no evidence whatever. I can tell you I've seen Mr. Rubinson -- I don't know what, if anything, he secrets and I don't warrant to the Court that he doesn't secret because I simply don't know. But I do

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know what the outward demonstrable evidence is, and I think this U.S. Attorney, or whoever prepared this affidavit, it's preposterous for him to do this.

I have seen with my own eyes these things. And it simply doesn't support the conclusion that Mr. Rubinson is a wealthy man.

MR. WOHL: Your Honor, I think that--

MR. ANDREWS: I'd hate to interrupt, but I think this is wholly inappropriate to bring these things in now in an effort to fortify the record.

THE COURT: We have already gone over it before and I already found Mr. Rubinson could retain counsel. In any event, he waived it, telling me that he was going to represent himself and telling me he had a lawyer, and finally coming in here on the eve of trial and saying he did not have a lawyer, and we have already said that was part of his strategy on the trial.

MR. ANDREWS: I recall the Court appointed two attorneys for him and they both backed out of the case, Judge.

THE COURT: Well, that was before I recollected that he had been here before and we had gone over that. I then sent for the record and found that he appeared before Judge Knapp and before myself. I had not remembered

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that. And the U.S. Attorney did not refresh my recollection. And when I discovered we had been all over that, of course, I did not proceed with that.

But I felt it was taken up for the first time --

MR. ANDREWS: I surely don't --

THE COURT: -- until I reviewed the record.

MR. ANDREWS: I assure you I don't want to reargue your Honor's ruling, and it's not my purpose to do it at all.

THE COURT: As I said, the only possible ground for appeal -- I have gone over this -- is the counsel issue, and I have just gone over that.

MR. ANDREWS: Your Honor, I think there are numerous issues that spring to my mind.

THE COURT: The fact that he cannow retain you to take an appeal again, he could have retained counsel if he wanted to in this case.

MR. ANDREWS: I don't think it proves anything, Judge. I think the cost to me to represent him on this appeal with the knowledge I do have of the case and because I'm going to be representing Mr. Levine, whose position is similar on some points, and just because appeals --

THE COURT: I don't see any similarity between his case and Mr. Levine's.

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MR. ANDREWS: With respect to certain points, and I do say just some points, Judge, I do have a good feel of the case and the fact is that appeals are generally clearly much less time consuming and, therefore, much, much, much less expensive than a trial.

The difference is one of night and day, and Mr. Rubinson, as I say, has not paid me a fee. And I do not look to Mr. Rubinson for a fee in this situation. And if I had to look to Mr. Rubinson for a fee, I'd tell this Court in all candor I would not have accepted the retainer.

THE COURT: Just as he got somebody to make, guarantee payment to you, he could have done this before. Mr. Rubinson is the kind of person, as I have said, you cannot put much stock in anything he says.

MR. ANDREWS: The point I make here --

THE COURT: He is the kind of person who would secrete his assets. The evidence shows that. His conduct on this trial certainly shows that. He is a person that does not have any respect at all for law or truth. So that to say I ought to put stock in his word is really asking a great deal, Mr. Andrews.

MR. ANDREWS: Judge, all I'm asking is that, and I make this application indeed as much for my own sake as

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I do for his, that I be given the opportunity to work with him pending appeal, and I think I really -- I don't know, I can't speak for your Honor, but I don't think the record demonstrates over the years any kind of fear that Mr. Rubinson will not come in and surrender to do his sentence, and I think your Honor's sentence, I would have to say, is reasonable. It is my own impression that it is reasonable under all the circumstances, and I think there isn't the faintest doubt that he will come and surrender to do that sentence and that, really, I think, is the primary issue before you.

I think there are very other serious grounds for appeal for Mr. Rubinson, and I think first comes to mind the totally gratuitous statement of Mr. Weitzman.

THE COURT: Incidentally, I do not recall I saw that. Mr. Weitzman, as I recall, brought out that Mr. Rubinson had been -- this statement about Feiffer, I do not recall that.

I think I read your brief. Mr. Weitzman said that Mr. Feiffer had been convicted. I do not recall that. I know he referred to Mr. Rubinson's prior conviction.

MR. ANDREWS: What he said was, Judge, he said, "I'm not in the same category as being a criminal, the same as you and Stein and Feiffer are. I'm not a convicted

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perjurer like you."

That's what he said.

THE COURT: Referring to Rubinson?

MR. ANDREWS: Referring to Rubinson and saying, "I am not in the category of being a criminal such as you and Stein and Feiffer."

I was just quoting what he said.

THE COURT: Saying somebody is a criminal like that does not mean he has been convicted. That is a common expression, "You're a criminal."

MR.ANDREWS: I understand.

THE COURT: That does not necessarily mean a person has been convicted.

MR. ANDREWS: But he does say about Mr. Feiffer and Mr.Rubinson and he's the one I'm interested in, "I am not a convicted perjurer like you are." And in the context in which it was said, Judge, it was totally unsolicited, uncalled for, could not have been expected --

THE COURT: Who owns this house that Mr.Rubinson lives in?

MR. ANDREWS: I'm informed it is owned by his wife and his daughter, your Honor. Or his wife and his son. One combination of those two; I'm not certain.

There is an equity above the mortgage in that

house, realistically speaking, perhaps of $30,000 if it could be sold, and that is before a possible real estate commission.

And then I think your Honor would have to take into account the position the family would be in if it did not have a home. If the home were sold to pay for an attorney, they would be destitute. They don't have anything. And the government has offered no evidence to the contrary.

I think the better practice clearly would have been to appoint him an attorney and if the government really believed in what it was saying, it had plenty -- a civil remedy to recover the funds for the government.

MR.WOHL: Your Honor, may I be heard on this point?

THE COURT: Yes.

MR.WOHL: It seems to me that, for example, the ownership of the house is an excellent example of the kinds of responses that the Court has gotten whenever there's been any attempt to look into Mr. Rubinson's financial condition. The documents attached to my affidavit establish that at one point Mitchell Rubinson claimed that he was the owner of the house, even though we know that Norman Rubinson had lived in the house for many, many years.

Now it is claimed that the wife and the daughter of the owners of the house, possibly because Mitchell Rubinson found it to his advantage to transfer the house from his name over to their names. Mr. Rubinson testified very clearly at the hearing that your Honor held that the title is now with his wife and the daughter.

In the probation report, if I'm not mistaken, there was a statement to the effect that the Rolls Royce that Mr. Rubinson owned had been transferred by Mr. Rubinson to the daughter. We have got this shifting around.

And also in this adfidavit I attached a document and I mentioned that Mr. Hochen for the SEC tells me that this Britania Corporation is the corporation that owns Mitchell Rubinson's house. Also on Hibiscus Island. We mentioned before that Judge Tenney found in the prior SEC enforcement proceedings to get Mr. Rubinson to divulge his securities transactions that this Equity Capital Corporation was nothing more than the alter ego of Mr. Rubinson, through which he made a number of financial transactions.

In addition, it is now clear that at the very moment that Mr. Rubinson stood up in court and said that he may stay at his mother's house, which we would submit would be something anyone who was even close to being

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impoverished would be likely to do in these circumstances, when he stands up and tells the Court that, at that very time he is checked into a hotel and paying -- he is switching from a $72 a night room to a $52 a night room. And his responses over and over again are evasive and not candid.

In addition, I thinkwhat your Honor was recalling about an airline was just after Mr. Rubinson had gone through this hearing explaining to your Honor how he did not have very much money and he did not have -- he was not employed at all, had no income and didn't own any stocks, the question of Mr. Rubinson's passport arose. I am not sure if this was put on the record, whether the reporter got it or not. It hasn't been transcribed so far, but your Honor may recall that the question arose as to whether he should turn over his passport, and Mr. Rubinson said he didn't want to turn over his passport because it would interfere with his activities as the part owner of an airline, and he certainly hadn't told anybody about that when he was asking for appointed counsel.

So I would submit that the Court would be thoroughly entitled to draw the inference that what we've got here is a man who just is seeking to compartmentalize his assets and divest himself of various types of assets,

and if that kind of person can come into court and get appointed counsel, it seems to me that we're just inviting defendants to engage in this very type of charade where they just have everything held in somebody else's name and then they can walk into court and swear they don't have any money.

I submit the record is full of that in this case and full of Mr. Rubinson's activities in furtherance of his design to represent himself at trial and occasinally put in remarks suggesting that he doesn't know what he's doing so that he can then capitalize on that on appeal.

And I just think, furthermore, that Mr. Hudaharris, as your Honor may recall from the hearing, is a resident of that Miami area; he's thoroughly qualified to make the observation that he does make, that this house is located in a posh area where there are high land values and that the Court is entitled to accept that, particularly in the total absence throughout this entire period of any presentation by Mr. Rubinson of what might even start to be a candid, full disclosure of his financial circumstances.

And how counsel can get up at this point and say, well, if the government really wanted to nail down the house value, it could have done so at this late date, without ever having defendant Rubinson present any pictures,

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any description or anything concerning this house, I think is a very weak position.

I think that the record clearly indicates that what we do know, the very limited amount we do know about this man's financial condition, gives every indication that he always comes up with the money to treat himself in the style to which he seems to have become accustomed.

And furthermore, the Court can draw an inference from his evasive responses in a number of occasions.

MR. ANDREWS: If it please the Court, may I respond?

THE COURT: No. I think I have heard the subject at great length.

MR. ANDREWS: I would simply like to correct the record, that Mr. Wohl expanded it further yet with more statements like "The Court could well infer," more statements like "It's reasonable to infer," and not one shred of evidence.

I am content with this record for appellate purposes as it stands now, and resent his trying to expand it after the fact ex post facto, but if he wants to do it, I insist he do it accurately and I really would like to address the Court on one point.

THE COURT: What is that?

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MR. ANDREWS: The point is, your Honor, when he raises the question that Mr. Rubinson observed at the hearing that he may live with his mother during the course of the trial, his mother, your Honor, has a small one-bedroom apartment way out in Brooklyn. She's an invalid dying of cancer.

It was determined in -- Mr. Rubinson's wife and he determined that they were to appear together and they'd be here in New York and she'd stay with them during the trial. It was impossible for them to live together in that apartment. That was a decision that wasn't reached at that time. He said he may live with his mother.

He was living in a hotel. He moved out of that hotel a few days after he got there, when he realized how long he was going to be here, and he couldn't afford a hotel like that.

That's the reason for that. Every bit of this has a reasonable explanation. The government went to the trouble to go and get all these hotel records. They could have ordered a title search. I'm sure a title company would have done that for the U.S. Government for nothing and determine whether the wife and mother own the house or the wife and son. I don't think it matters very much.

All of this is subject to interpretation, and

the point I would like this court to reflect on is whether or not -- Mr. Wohl's arguments are great. You can, by innuendo, draw one conclusion but what happens to the Fourth Amendment? If a fellow is really indigent and comes in and says "I am indigent and I don't have any money and this is all I have," and the government gets up and speculates, what happens to his right to counsel? We can't expect a fellow --

THE COURT: We did not have any speculation here.

MR. ANDREWS: We have had nothing but speculation from the government.

THE COURT: Based on the house he owned, we had a hearing on his ability to afford counsel. You have forgotten that. You may not have been present, Mr. Andrews, since you did not represent him. We had a hearing. Mr. Rubinson took the witness stand, it is my recollection; is that right?

MR. WOHL: That is correct, your Honor.

THE COURT: We had a hearing on whether he could afford counsel. There is no speculation. I made a finding on the record that he was not qualified for assistance under the Criminal Justice Act.

MR. ANDREWS: If it please the Court, as a man of limited education and no legal experience, he came in

representing himself on that hearing.

THE COURT: With respect to thebail, the bail is set at $30,000 cash or surety bond pending appeal.

That is all gentlemen.

MR. ANDREWS: If it please the Court, that's tantamount to a remand, I think. Would your Honor please consider continuing as he has been?

THE COURT: We won't see Mr. Rubinson if he gets out of here with his passport and whatever this is he has got going on Santo Domingo.

MR. ANDREWS: Judge, he does not have anything --

THE COURT: In addition to the fact that I do not think he has any substantial ground for appeal.

MR.ANDREWS: Judge, he doesn't have a passport. The State Department has been notified that it's been lost.

THE COURT: We have been over that also.

MR. ANDREWS: There's nothing going on over in Santo Domingo.

THE COURT: By his own statement in court, he has --

MR. ANDREWS: Judge, he had an interest in an airline that was defunct. I can name the airline for you. He never received a penny from it. This is the point, he dealt in such candor with the Court that he told you things as they came into his head, which are now

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prejudicing him, which don't add up to a hill of beans. He didn't own any airline.

THE COURT: He did not say he did. He said he was involved.

MR. ANDREWS: He said he had a 2 per cent interest in an airline. I have looked into it. The airline is a silly little thing in South America that doesn't work any more, and he never got a dime out of it, Judge, and because of that he's being prejudiced now. He was a babe in the woods here.

THE COURT: Mr. Andrews, we have been over your motion.

MR. ANDREWS: Would your Honor consider a little bit less bail, something we can reach?

THE COURT: His bail is set at $30,000. He has, as I can see, a frivolous appeal.

The evidence against him was overwhelming and there is no basis at all for saying that he was entitled to counsel under the Criminal Justice Act.

As I have said, he has waived it by saying he would represent himself.

I have warned him of the problems, and the record will reflect that Mr. Rubinson's conduct on the trial was trying to disrupt the trial, to prolong the

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proceedings and to constantly disobey the Court's orders. All that is in the record.

All right, gentlemen.

MR. ANDREWS: Thank you, your Honor, for reconsidering.

Thank you.

MR. WOHL: Thank you, your Honor.

THE COURT: All right, gentlemen.

- - -

1964a Defendant Rubinson's Judgment

d States of America vs. **United States District Court** for THE SOUTHERN DISTRICT OF NEW YORK

ENDANT: NORMAN RUBINSON

DOCKET NO.: 74 Cr. 573

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: May 15 DAY: 15 YEAR: 1975

UNSEL

[X] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL THOMAS A. ANDREWS, ESQ. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

NDING & DGMENT

There being a ~~finding~~/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly directly and indirectly causing to be carried by means and instruments of transportation in interstate commerce for the purpose of sale and delivery after sale, Securities, with no registration statement as to such securities was in effect with the United States Securities and Exchange Commisssion: and Conspiracy so to do(T. 15, U.S.C. Secs. 77e,and 77x; T18, U.S.C. Secs. 371 and 2).

ENTENCE OR ROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on each of counts 1 and 14 to run concurrently with each other

Bail pending appeal fixed at $30,000, cash or surety

MICROFILM
MAY 20 1975

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

Commitment at Eglin, A.F.B. in Florida

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. DISTRICT COURT FILED MAY 15 1975 S.D. OF N.Y.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

CONSTANCE BAKER MOTLEY

Constance Baker Motley

1965a Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

Plaintiff, : 74 Cr. 573 (CBM)

-against- :

NORMAN RUBINSON, ET AL., : NOTICE OF APPEAL

Defendants. : Ct. of Appeals Doc. #75/1197

- - - - - - - - - - - - - - - - - - -x

S I R S :

PLEASE TAKE NOTICE that Norman Rubinson, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Final Judgment entered in this action on the 15th day of May, 1975.

Dated: New York, New York
May 15, 1975

SHEA GOULD CLIMENKO KRAMER & CASEY

By S/ RALPH L. ELLIS
A Member of the Firm
Attorneys for defendant
Norman Rubinson
330 Madison Avenue
New York, New York 10017

TO:

CLERK OF THE COURT
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Court House Annex
One St. Andrews Plaza
New York, New York 10017
Attn.: Frank H. Wohl, Esq. A.U.S.A.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 74 Cr. 573

NORMAN RUBINSON, :

Defendant. :

----------x

May 16, 1975
10:45 a.m.

BEFORE: HON. CONSTANCE BAKER MOTLEY,

District Judge

APPEARANCES:

PAUL J. CURRAN, ESQ.
United States Attorney for the
Southern District of New York
BY: FRANK WOHL,
Assistant United States Attorney

SHEA, GOULD, CLIMENKO, KRAMER & CASEY, ESQS.
Attorneys for defendant Rubinson
BY: THOMAS ANDREWS, ESQ.
JOHN J. GRIMES, ESQ.,
of Counsel

MR. WOHL: Your Honor, the government has requested a hearing in this situation because, as we understand them, the circumstances are that after your Honor fixed bail for Mr. Rubinson yesterday afternoon, by approximately 6 o'clock yesterday evening Mr. Rubinson was prepared to make the bail and we submit there is some question as to, first of all, the source of Mr. Rubinson's funds coming so rapidly after his attorneys claimed in court that he has no funds, and secondly the question of whether this is adequate security to insure Mr. Rubinson's presence to serve his sentence, because, as I understand it, the purpose of bail is to insure the defendant's ultimate presence, and if he is getting out on bail under circumstances where there is no tie at all to the court, that is, between Mr. Rubinson and the Court, then it would seem there is some question as to whether he should get out under those circumstances.

And, as I understand it, that tie may not exist here and I think it therefore would be appropriate to inquire into it to see whether he is making bail under circumstances that would insure his presence in court.

THE COURT: All right.

Do you have anything to say, Mr. Andrews?

MR. ANDREWS: First, your Honor, I would request

that the government state its authority for this proceeding.

MR. WOHL: The basic authority I think comes from the Nebbia case, United STates versus Nebbia, 357 F 2d 303.

That case was decided in 1966, but, as I understand it, it has been enlarged upon, or at least followed, in subsequent cases.

The gist of the Nebbia case was that it was a case very similar to this one in the sense that the defendant pleaded with the Court to reduce bail below what the Court had ordered and subsequently made bail right after saying that he couldn't make bail, and in that case the Second Circuit held that the Court was entitled to inquire into the circumstances under which a defendant makes bail and the Court observed that it is not the sum of the bail bond that the society asks for but rather the presence of the defendant.

And the point being made there was that under circumstances like this somebody might appear to be satisfying the bail that was fixed by the Court under circumstances where there is no reason to believe that bail is going to hold the defendant and cause him to appear.

THE COURT: Yes, I think the statute itself, Mr. Andrews, contemplates the Court inquiring into the conditions of bail and to set additional conditions if it appears that

originally set were not sufficient.

So a hearing is granted.

What is the next step?

MR. ANDREWS: May I attempt to distinguish the Nebbia case, your Honor?

THE COURT: Yes.

MR. ANDREWS: First of all, that case involves a narcotics, a defendant convicted of a substantial narcotic violation, I think.

Secondly, the Court set $100,000 cash bail and that $100,000 in cash was delivered by his attorney immediately thereafter. That may be considered a suspicious circumstance which may rightly warrant the Court in wondering what was the source of the funds and whether or not they would in fact hold the defendant or guarantee that he would come back.

We have neither of those situations here. First we have a case in which the defendant has always reported, been free virtually in his own recognizance. We have a situation where I advised the Court that there was about a $30,000 equity in his home and your Honor set that amount as bail, and we have not come in with $30,000 in cash at all but a surety bond.

THE COURT: I didn't understand you yesterday to say he had $30,000 equity.

jglt

MR. ANDREWS: I'm sorry, your Honor. I'm convinced that I said that the home, if it was salable, was probably worth about $70,000, that there was about a $40,000 mortgage on the house, and that roughly there was an equity of about $30,000. I think that's in the record.

THE COURT: And you think that somebody with a $30,000 equity in his home is entitled to appointment of counsel under the Criminal Justice Act? Is that your position?

MR. ANDREWS: Yes, your Honor. And on that point, your Honor, I would respectfully refer the Court to the report by Judge Pollack of this court from Magistrate Goettel in which he explores the point that simply because a man who is middle class has an equity of about $30,000 in a home or has a salary of about $30,000 a year doesn't mean that within our legal system, in our big cities, given the complexity of federal cases, he can afford to go out and hire an attorney.

This case is a perfect example, because if Mr. Rubinson had (1) been able to sell the home for the full $70,000 in the depressed market condition that exists in Florida now, he would maybe have, after capital gains taxes, after brokerage fees, etc., enough money to hire a second-rate attorney in New York City to represent him. But then

one wonders where his family would reside. Virtually that is the question.

So just because there is a $30,000 equity simply doesn't, if we are going to be realistic, in my view, say a man can go out and hire an attorney for a nine weeks security fraud case who is competent to represent him. It doesn't mean that at all.

He had no income. His wife had no income.

THE COURT: Well, you are making a lot of statements now about he had no income. The record in this case discloses that large amounts of money were realized from this transaction that nobody seems to be able to account for.

MR. ANDREWS: It was six years ago, and I told your Honor that those funds were dissipated at that time.

THE COURT: That's your statement. There is no proof of that here.

MR. ANDREWS: I understand, your Honor. Nevertheless, that case, the Nebbia case, seems to be substantially different in a number of ways from the one before your Honor. And what I think Mr. Wohl is saying is that if yesterday afternoon your Honor felt that $30,000 bond was reasonable bail --

THE COURT: We are inquiring into it now, where that money comes from.

MR. ANDREWS: This is precisely what Judge Waterman feared in his dissenting opinion in the Nebbia case, and I would like to quote what his Honor said. He said:

"I can only visualize a program of harrassment ahead if Judge Sugarman should decide to permit the interrogation the government requests."

In a case involving narcotics and $100,000 cash bail from undisclosed sources, I can see where the Court of Appeals may think the courts below are being put on. In the narcotics area there are virtually huge fortunes available to people.

THE COURT: The same in stock frauds, in my view, the same in stock frauds. Some of the biggest cases in terms of monetary amounts involve stock frauds, equalling the amounts involved in the narcotics trdae. The stock fraud trade is one of the biggest frauds in the United States.

MR. ANDREWS: If you believe the case before your Honor, if you believe Stein, there were $200,000 made maybe, and that was divided among some fourteen people.

THE COURT: You asked me out of one side of your mouth to not believe Stein and on the other side you ask me to believe him.

jglt

MR. ANDREWS: I never asked you to believe Stein.

THE COURT: You are asking me now.

MR. ANDREWS: No, I am not. I said if you believe Stein, the most there was there is $200,000, and that was divided among at least fourteen people, and in the SEC injunctive proceeding there were fifty defendants named. That is a lot of people to divide up that kind of money with.

But nevertheless it was six years ago. A lot has happened in those six years, your Honor. But here, if a defendant makes the bail that the Court felt was reasonable, if a bondsman is willing to go on the line for him --

THE COURT: We are going to inquire into it.

MR. ANDREWS: I am completely unfamiliar with this proceeding. May I request who has the burden, what is the form that we follow? What do we do?

THE COURT: We will take a recess and you can read over the Nebbia case.

MR. ANDREWS: I have read it. I don't know who has the burden of going forward.

THE COURT: The government challenges it. That's why we are here.

MR. ANDREWS: Thank you, your Honor.

THE COURT: It is not my idea.

jglt 9

MR. WOHL: I would think, your Honor, that the way to proceed would be to put on the record exactly what the terms are of this proposed making of bail. I think Mr. Andrews has the bail bonsman or said he was going to have the bail bondsman in court.

MR. ANDREWS: I never made any such statement. I was told this morning at 9:30.

THE COURT: Excuse me. Read that back, Mr. Reporter.

(Record read.)

MR. ANDREWS: Your Honor, I never made any such statement. I was only told this morning at 9:30 that the government wanted a hearing of this kind. I don't control the bondsman. In my practice, this is the first time in my life I have ever dealt with a bail bondsman. I don't know anything about what they do. All I know is that they are supposed to be there to write bonds in appropriate situations. I contacted one and he agreed to do it.

I called him. He is a man, I would estimate, in his seventies. He has just been released from a hospital for serious surgery and is going to the doctor today and said he wouldn't be available until Monday.

THE COURT: The bail bondsman?

MR. ANDREWS: Yes, your Honor. First of all,

Mr. Wohl said proposed. There is nothing proposed about this. Your Honor set bail. The defendant made the bail and has been released since last night and appeared voluntarily this morning in this courtroom and sits here before you.

THE COURT: What is the bail he made?

MR. ANDREWS: A bond was furnished in the amount of $30,000 by a bail bondsman, well known, been in the business for many years.

MR. WOHL: We had a brief discussion in the Magistrate's office last night, your Honor, and no one actually testified but in this informal discussion it appeared that the bail bondsman was writing this bond without any security whatever from Mr. Rubinson and some kind of a promise that Mr. Rubinson was going to come up with $10,000 in cash by some time next week.

Now, it would seem just on the face of it that the bail bondsman has no security at this point from Mr. Rubinson.

THE COURT: Was the bail bondsman present last night?

MR. WOHL: There were several people whom I don't know to be there, that is, who I didn't recognize. Ther were several people standing there. I understood one of them to be the bail bondsman.

jglt 11

MR. ANDREWS: I can tell you who he was. He was the bail bondsman's agent, your Honor, authorized to sign a bond for the insurance company. The bail bondsman is Mr. Newman. He sent his agent to the Magistrate's office.

THE COURT: What security was given?

MR. ANDREWS: None at this time. The bail bondsman looked at me I'll frankly report to the Court. He said "What the heck was bail set on this fellow for," that was precisely his reaction and he had absolutely no hesitancy to sign a bond for this man because he had no doubt.

THE COURT: You mean he decides who is to be bailed in the United States District Court?

MR. ANDREWS: No, your Honor.

THE COURT: Is that it?

MR. ANDREWS: No, your Honor. He decides his own question as to whether or not it is a risk involved in executing a bond for a defendant and he obviously felt no risk involved with this defendant. He has known his family. There have been mutual acquaintances for many years socially. The man is well known in philanthropic work and has known the family of Mr. Rubinson for two generations, I think. And had absolutely no fear of signing a bond on the strength of the representation that he would be given a deed in lieu of foreclosure to Mr. Rubinson's house and a cash sum in the

amount of some 10,000, which is not now -- we can't give it to him now. Mr. Rubinson has to arrange to get it for him. And the man was willing to take his word and he came in and signed the bond and so stated before the Magistrate. So at this point there is no security. But the question is whether or not there is a $30,000 bond which would have to be forfeited if Mr. Rubinson did not appear and then the bondsman would have all of his extraordinary common law powers to seize Mr. Rubinson and return him. And those powers that a Judge could give a peace officer in order to return a fugitive.

MR. WOHL: It would seem, your Honor, that under these circumstances --

MR. ANDREWS: We have also signed some kind of commitment, your Honor.

MR. WOHL: Under these circumstances it would seem that what we have here is exactly what the Nebbis Court was talking about when it said "If the Court lacks confidence in the surety's purpose or ability to secure the appearance of a bailed defendant, it may refuse its approval of a bond even though the financial standing of the bail is beyond question."

The point is here we seem to have a bail bondsman who --

THE COURT: It is a personal friend of the defendant's and decides who is to be bail and who ought to be bail, according to Andrews' statement.

MR. ANDREWS: He is not a personal friend. He never met the defendant. He does know the defendant's family which is some of the criteria which a Court determines in determining whether or not a man is a risk and knows that Mr. Rubinson comes from good people.

THE COURT: I never heard of a bail bondsman deciding if the Court was wrong and the man didn't have to be bailed and therefore he would let him out on his own recognizance. I never heard of that.

MR. ANDREWS: That wasn't his decision at all. The question he was addressing himself to was whether or not Mr. Rubinson was a good risk for him to take, not for the Court. He felt absolutely no danger in taking the risk that Mr. Rubinson would appear. I advised him of Mr. Rubinson's history, I advised him of his roots in the community, of his family. When advised who Mr. Rubinson's family was, who is people are, the bondsman knew some of them. He knew them because of philanthropic activity for a Jewish organization and he felt that there was no risk and I simply advise your Honor. You wondered why he did it and I told you, because he felt there was no risk that Mr. Rubinson would flee and

refuse to return to court and he has returned to court every time he has ever had to and he is here this morning. He was free all night, Judge.

MR. WOHL: Last night, your Honor, before the Magistrate, there was no discussion -- well, I don't recall any discussion -- about the bail bondsman knowing Mr. Rubinson. There was discussion, however, that the bail bondsman knew Mr. Andrews' law firm and there was some kind of a friendly, informal standing behind Mr. Rubinson by the law firm.

MR. ANDREWS: There was no standing behind. I think the bondsman observed --

THE COURT: I think this proves we need a hearing. We will ask the Magistrate and the bondsman, whoever it was, to come up. We will hear it at 2:30.

MR. ANDREWS: May I address --

THE COURT: I just stated a ruling, Mr. Andrews.

MR. ANDREWS: Without hearing me, Judge, in response to what Mr. Wohl said. And I didn't represent the truth to the Court.

THE COURT: I am not going to hear it like this. Everybody here is going to take the witness stand and testify under oath at 2:30.

MR. ANDREWS: The bondsman isn't available, Judge.

THE COURT: The bondsman is what?

MR. ANDREWS: He isn't available. He is at his doctor's office. He has just been released from the hospital and is often seen.

THE COURT: Who was here last night and doing all this talking?

MR.ANDREWS: His agent.

THE COURT: That agent will be here at 2:30. Call him up now. 11 o'clock. Tell him I said to be here at 2:30. That's all. I have a jury out and I have a note from the jury.

MR. ANDREWS: Yes, your Honor.

AFTERNOON SESSION

2:30 P.M.

MR. WOHL: Government ready.

MR. ANDREWS: Defendant ready.

May I take a moment to introduce to the Court Mr. Ralph L. Ellis, a partner of my firm, who will represent the defendant at this hearing in light of your Honor's statement that all parties who were present yesterday may be called as witnesses and I assume that will include Mr. Grimes and myself.

THE COURT: All right, Mr. Wohl.

MR. WOHL: Your Honor, we have an additional case that I don't know whether your Honor may have seen, decided by Judge Cannella, United States v. Arturo Gonzalez, which I think sets out in some additional detail the position that the government was urging this morning, which is that it is proper to seek whether or not the mere making of a financial bail arrangement provides some basis for believing that it is security that the defendant is actually going to appear.

I would like to hand a copy of that to the Court.

THE COURT: Let's proceed with the testimony.

MR. WOHL: We have the magistrate here, your Honor, and I would think it might be appropriate for Magistrate Goettel to explain to you what his understanding was of what was being said yesterday.

I don't know whether you would want him to actually be under oath and testify as a witness or handle it in some other manner.

THE COURT: Magistrate Goettel, do you want to state what transpired yesterday?

MAGISTRATE GOETTEL: Would you like me to take the stand, your Honor?

THE COURT: Yes.

G E R A L D L . G O E T T E L , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WOHL:

Q Magistrate Goettel, would you explain to the Court what occurred yesterday afternoon with respect to the arrangements for bail for Norman Rubinson, the defendant here?

A At approximately 4:30 I was advised that the Court had set bail in the amount of $30,000 on an appeal

on a defendant by the name of Norman Rubinson.

Since we did not have the remand papers from the Court, it was necessary to obtain the United States Attorney's acknowledgement concerning the bail terms. At that time there was apparently a United States Attorney's Office staff meeting in progress and we were unable to reach either you or anyone else connected with the case until approximately 6:30 in the evening.

At that time you appeared, the attorney for the defendant appeared. You acknowledged that the bail terms were as represented by the surety. The surety was also present, with a bail bond prepared in the amount of $130,000. You advised that although the bail was as fixed by the Court, you wished to have what is known as a Nebbia hearing, to inquire as to the sources of the surety to the surety company.

We had some informal discussions with the bondsman, Mr. Farley, and with the attorney for the defendant, I believe his name was Andrews, from the firm of Shea, Gould, who advised that the surety underwriting the bond for the company was to be a security interest in a house in Florida which had an equity value of $20,000 to $30,000 but which would be a very sound sale investment at this time because of depressed conditions in the Florida

real estate market, and that the bondsman wanted an additional $10,000 cash as surety to cover the bond, that they didn't have the $10,000 at that time, that they weren't certain where they were going to raise the $10,000, and that they were to have a meeting later last night between Mr. Newman, who was the bondsman, and the attorneys for the defendant, and I assume the defendant and his wife also, to discuss when and how the additional surety monies would be posted.

I inquired of the attorney for the defendant, Mr. Andrews, on what the bondsman would be relying upon in this interim period and at what point the $10,000 would be posted, and I cannot recall his exact words, but the essence of it to me was that until such time as the money had been put up by the defendant or his family or someone else that the bondsman would be relying upon the word of the Shea, Gould firm that the surety would be made whole on the required security.

With reference to the question of the Nebbia hearing, I stated that I thought that this was a matter you should take up with Judge Motley, who had set the bond and who would be in a position to know whether one was appropriate; that it was my belief that you had an almost unrestricted right to have such a hearing if you requested

it but that I didn't believe it would be appropriate at 6:30 or 25 of 7:00 in the evening to refuse bail at that time when it met the terms of the Court and in effect keep the defendant overnight, particularly when we couldn't be certain that Judge Motley would go ahead and hear the Nebbia hearing today.

I told you to advise her Honor that if you wanted me to hear the evidence on the matter today I would be available to do so, and the bond was then executed in my presence and I have the bond in front of me now and the parties left at, I would guess, 25 of 7:00 or a quarter of 7:00 last night.

MR. WOHL: May we have the bond marked as an exhibit.

(Government Exhibit 1 marked for identification)

Q Magistrate Goettel, is Government Exhibit 1 for identification the bond that you just referred to?

A Yes, it is.

MR. WOHL: The government offers Government Exhibit 1 for identification.

MR. ELLIS: I have no objection.

(Government Exhibit 1 received in evidence)

Q Magistrate, at the informal discussion yesterday, was anything said as to whether or not papers were being executed to give the surety a lien on the house yesterday afternoon?

A Mr. Andrews said that a document -- I don't recall how he styled it, but I think it had the effect of an execution of judgment against the value in the property -- would be executed. I don't recall whether he implied that it would be executed last night or precisely when, just that there would be such a document executed.

MR. WOHL: I have no further questions.

CROSS EXAMINATION

BY MR. ELLIS:

Q Magistrate, could you just tell me once again your best recollection of what Mr. Andrews said to you with respect to what would happen until the $10,000 was put up?

A I believe I asked Mr. Farley how long they had to post the $10,000, and Mr. Farley replied that that was something they would negotiate with Mr. Newman later in the evening last night.

THE COURT: Who is Mr. Farley, again?

THE WITNESS: The gentleman sitting at that

table back there. He is the local representative for Mr. Newman's bonding company. I don't think I've ever seen Mr. Newman. All I ever see is Mr. Farley.

Then somehow or other I implied that I wondered where this left the bonding company during the interim period. Then Mr. Andrews assured me that he had no doubt in his mind about the appearance of the defendant and that he was certain the defendant would appear and that his firm was standing behind this bond and the bond was being written at the request of the Shea, Gould firm, from which I gathered that the bond, even in the absence of the $10,000, was being written on the strength of the Shea, Gould representations that the money would be posted.

But I must tell you that was my inference from it and to my recollection it wasn't specifically stated.

Q When you say "it wasn't specifically stated," what do you mean by that?

A Mr. Andrews' words were "We have asked him to write the bond and my firm," or I -- I don't remember whether he said I or my firm -- "feel very certain that the defendant will appear and that the additional surety will be posted and that the bonding company knows we'll

stand behind it," or some words like that.

Q But you don't recall specifically what the words of Mr. Andrews were?

A I don't. I think the implication was there never would be any problem because the money would be put up, the $10,000.

But at that point it was very unclear where it was going to come from, to the extent that we knew that the Nebbia hearing was requested, I said, "How can you inquire about the source of monies which haven't been produced yet?"

Q Was Mr. Andrews talking about the $10,000 that was going to be put up or was he talking about his feeling that regardless of whether the $10,000 would be put up he personally felt that the defendant would appear?

A I took him to be talking about both. That was the way I interpreted it. I really was more concerned from the standpoint of Mr. Farley, who told me that he was requiring the $10,000 as collateral toward this bond, which he didn't have and which he wasn't certain where it was coming from, and I wanted to make sure whether, under these circumstances, he was satisfied to write the bond.

He apparently was satisfied, by what Mr. Andrews

was saying, that he could go ahead and write the bond.

Q You don't know what he and Mr. Andrews said prior to coming down to see you.

A Not in the slightest. They had no discussions in my presence except to and from me. They didn't talk with each other.

Q Do you know what position Mr. Andrews holds with the firm of Shea, Gould, Climenko, Kramer & Casey?

A No idea.

Q You don't know whether he can speak to the firm of Shea, Gould insofar as --

A I don't. And I might say I wasn't -- from my standpoint I wasn't concerned. So long as the bonding company was willing to stand by and write the bond for the purposes of having the bond executed last night, that was all that really concerned me. I realize the United States Attorney's Office is interested for Nebbia purposes in these other matters, but that was what I felt had to be presented to Judge Motley.

Q Mr. Farley was present?

A Yes.

Q Did Mr. Farley evidence any hesitance about writing the bond?

A No.

MR. ELLIS: No further questions.

MR. WOHL: I have no further questions, your Honor.

THE COURT: All right. Thank you. You may come down.

(Witness excused)

THE COURT: Is there another witness?

MR. WOHL: Yes. The government would like to call Mr. Farley.

THE COURT: All right. Mr. Farley.

C H A R L E S P . F A R L E Y , called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WOHL:

Q Would you explain exactly what your position is for the company that you just mentioned?

A Public Service Mutual Insurance Company. I am an executing agent for the Public Service Mutual Insurance Company. I execute bonds principally for Mr. Newman, who is also an agent of the same company, and for other agents of that company.

Q Do you execute bonds for other companies as

well?

A No, only for the Public Service Mutual Insurance Company agents.

Q Is there any difference between the duties and responsibilities of your position and the duties and responsibilities of Mr. Newman's position?

A Yes. As an executing agent, I merely physically execute the bond. I don't concern myself as far as obtaining collateral or being responsible for liabilities in respect to a bond.

Mr. Newman is the one who arranged with the collateral and he is the one who is responsible for the liabilities of a bond.

Q Who makes the decision as to whether or not a particular bail bond will be written?

A Mr. Newman.

Q Now, how did you first learn about the proposal to execute a bail bond in connection with this case and the appearance of the defendant Norman Rubinson?

A Late yesterday afternoon I received a call from Mr. Newman instructing me to come down to the Magistrate's office and write a bond for the defendant for $30,000.

Q So in effect the decision had already been

made when you got the call, is that it, that is, the decision to accept this bond?

A Yes.

Q Did you have any discussions with Mr. Rubinson as to what his collateral was?

A No.

Q Did you have any discussions with Mr. Rubinson's attorney as to what collateral Mr. Rubinson had?

A Firstly, I think Mr. Andrews mentioned that there was a deed to some property in Florida and the $10,000 involved.

Q The $10,000 cash.

A Yes.

Q Did you state to them that you were insisting on $10,000 cash or was that again a decision that had already been made by Mr. Newman?

A That was Mr. Newman's decision.

Q You were present yesterday in the Magistrate's office, is that correct?

A Yes.

Q Did you hear any discussion along the lines that the Shea, Gould firm was going to in some either formal or informal way stand behind Mr. Rubinson?

MR. ELLIS: I object to the question, your

Honor, as leading and suggestive.

THE COURT: Overruled.

Q Did you hear any discussion on that subject at all?

A I think there was -- well, you say an informal discussion about it when we were all in the Magistrate's .

Q Right. Would you tell us what you heard on that subject?

A Well, Mr. Andrews I believe was stating to the Magistrate that he felt the defendant would return, that he was reliable, and that this reliability was such that his firm would put their good name, or whatever their reputation and so on, informally, conversation like that.

Q Did you hear the Magistrate say anything on that subject?

A No, I don't recall if I did. I don't recall.

Q Was there any discussion on the subject of what would happen in the event that Mr. Rubinson fled?

A I don't recall that.

Q Was there any discussion on whether or not the bonding company could collect anything if Mr. Rubinson fled before he posted the $10,000 cash?

A There was -- I believe there was a discussion

regarding the property in Florida.

Q And that's all you recall?

A In other words, about the property in Florida and that the equity would be equal or almost equal to the amount of the bond, in the neighborhood of $30,000.

Q So far as you know, yesterday was any mortgage deed or other conveyance concerning this property executed?

A As far as I know? No.

Q And, as you understood the situation as of last night, did the bonding company have a lien on the house?

A As of last night yes. After we left this building we went back to Mr. Newman's office and in his office Mr. Rubinson and his wife signed a confession of judgment in my presence, and a bail application which I made out they also signed in my presence, which for our purposes in the bonding business ties up any and all assets that Mr. Rubinson has.

Q Do you have that document with you now?

A I don't.

Q Where is it?

A It would be in my office in Baxter Street.

Q At the time that Mr. Rubinson and his wife signed this document, was there any discussion as to what

assets they had?

A Not with me there wasn't any discussion. I understood he was going to then go later on that evening to Mr. Newman's residence and they would continue whatever they were discussing respecting the collateral, or the equity.

Q How many documents did Mr. Rubinson and his wife sign in your office last night?

A Two.

Q And could you describe for us what they are?

A One is called a bail bond application, in which on the front part you elicit necessary information respecting address, place of business, telephone numbers, et cetera, and which the applicant, in this case Mr. Rubinson, signed.

Then there is an affidavit of judgment and confession, which he signed.

Q That is the second document.

A That's correct.

Q Do you recall what Mr. Rubinson put on the application for his business?

A Yes. He gave me the name of a firm Brown & O'Shea in Florida.

Q On either of those two documents is there any

blank to be filled in showing the assets that the applicant, in this case Mr. Rubinson, owned?

A The only thing that I filled in was in respect to the house in Florida. I asked him what the value of the house was, what he thought the market value of the house was, a one-family house. He told me, I believe now, 70 and that he had an outstanding mortgage of, I believe, 40.

Q Did he tell you about any other assets?

A He did not. I did not ask him.

Q Did Mr. Rubinson tell you that he was the owner of this house?

A Yes.

MR. WOHL: One moment, your Honor.

(Pause)

Q Back in your office, did you have any discussions about this $10,000 cash?

A With Mr. Rubinson?

Q With anyone.

A No. I didn't, no.

Q At any time yesterday or last night did you have any discussion about the $10,000 cash?

A With Mr. Rubinson?

Q Or his lawyers.

A Well, I think Mr. Andrews mentioned it at the Magistrate's office. Whether he mentioned it solely to me or whether I first heard it whether he was discussing it in front of the Magistrate, I don't recall.

Q Was it part of your job to be concerned with whether or not there was going to be this $10,000 cash put up?

A No, it is not part of my job.

MR. WOHL: No further questions, your Honor.

CROSS EXAMINATION

BY MR. ELLIS:

Q Mr. Farley, you said there were two documents that were executed, I believe.

A Yes.

Q Were any or both of them executed by the defendant's wife?

A Yes. I thought I stated that before. They were both signed by both parties.

Q I see. And is that normal?

A Absolute procedure.

Q You stated that somewhere along the line Mr. Andrews mentioned $10,000, is that correct?

A Yes.

Q Tell me firstly, as best as you can recollect,

where you and he were when he mentioned $10,000.

A I was in the Magistrate's office.

Q Okay. And do you recall what Mr. Andrews said with respect to $10,000?

A The only thing I can recall is Mr. Andrews' conversation before the Magistrate, in which he said that there would be an attempt to obtain this money in order to satisfy the informal agreement with Mr. Newman and that said attempt might be made by getting it from one or more than one person to get up the aggregated sum.

Q Did he mention which person or persons?

A If he did, I don't recall. I don't think he did.

MR. ELLIS: I have no further questions.

THE COURT: Anything further?

MR. WOHL: No, your Honor.

THE COURT: Thank you. You may stand down.

(Witness excused)

MR. WOHL: Your Honor, at this point the government would normally call Mr. Newman. As I understand it, however, he is not here.

Does Mr. Andrews know where he is or Mr. Ellis?

MR. ANDREWS: He knows.

MR. ELLIS: Why don't we put Mr. Farley on the stand and ask him the question under oath.

MR. WOHL: All right.

May Mr. Farley resume the stand for that purpose?

MR. ELLIS: I have no objection.

C H A R L E S P . F A R L E Y , resumed.

THE COURT: You are stil under oath, Mr. Farley.

FURTHER DIRECT EXAMINATION

BY MR. WOHL:

Q Do you know where Mr. Newman is?

A He is in New Jersey, Newark, New Jersey.

Q At his office?

A No. He went to the office of International Fidelity Company. There is a business meeting there.

Q Do you know how long he is going to be at that business meeting?

A Well, he told me he wouldn't be back much before 5:00. Whether he returns prior to that, I don't know.

MR. WOHL: I have no further questions.

CROSS EXAMINATION

BY MR. ELLIS:

Q Do you know where Mr. Newman was prior to going out to Jersey to attent this meeting?

A I believe he had an appointment with his physician. He recently had an operation and he had to go back.

MR. ELLIS: Thank you.

(Witness excused)

THE COURT: Anything further?

MR. WOHL: The government has nothing further, your Honor.

THE COURT: Does the defendant have anything?

MR. ELLIS: Your Honor, I call Mr. Andrews to the stand.

T H O M A S A . A N D R E W S , called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATIC

BY MR. ELLIS:

Q Mr. Andrews, are you an attorney?

A I am.

Q And do you practice in the State of New York?

A I do. I am associated with the firm of Shea, Gould, Climenko, Kramer & Casey.

Q Are you admitted to practice before this Court?

A I am.

Q Would you tell us, please, what occurred before Magistrate Goettel yesterday?

A Well, briefly, we returned to the Magistrate's office. I had gone to Mr. Wohl's office to get him, to give him notice of what was going on in an attempt to get him to return to us. I found he had been in telephonic communication with someone in the Magistrate's office and knew what was going on.

We returned to the office and arrived at about 6:00 o'clock. Everyone had been very cooperative, including the Magistrate, his clerk and the marshals, who all stayed overtime in order to permit us to have this proceeding.

I walked into the Magistrate's office. As far as I know, there was no record made because the Magistrate indicated that he wanted to find out what the proceeding was about. I was with Mr. Wohl, Mr. Grimes, the accused Mr. Rubinson, or the defendant Mr. Rubinson, and several other people.

I introduced myself to the Magistrate, as I do to all judges, Thomas A. Andrews, the firm of Shea, Gould, Climenko, Kramer & Casey and the address of the firm. I told him what my understanding of what was going on was. He knew completely what the proceeding was about.

He made at some point in time -- having I think already reached his decision as to what to do and Mr. Wohl having agreed, that is to say that the defendant would be released and that if a hearing was to take place, first Judge Motley would be given the opportunity to conduct it and, should she decline, he would conduct it, Mr. Wohl agreed to that.

Then I don't know how it came up, but the Magistrate did ask, or it came up in discussion, what, if any, collateral had been furnished the bondsman, and I'm not sure again who it was that described the collateral, one that there was none. I think in fact Mr. Farley said, "Well, what is the use of holding a hearing now? Because no collateral has been in fact given yet. Wouldn't it make more sense to hold a hearing once the collateral is furnished?" And the Magistrate agreed, and I think we all agreed to that, including Mr. Wohl.

Then someone expressed curiosity, and I suppose it was the Magistrate, as to why the bondsman was

willing to make this bond without the collateral. And I believe I said to the Magistrate that I had spoken to him, that the bondsman had said to me -- when I was at Mr. Newman's house I told him that the bondsman had asked me, "What firm are you with?" And I told him and he said, "Oh, Jesse Climenko. I have known Jesse for 35 years." He then said, "And I've known the defendant's wife's family since way back in Brownsville 30 or 40 years ago" and the defendant was a very dear friend of a fellow who had been a very dear friend of his for many, many, many years, that the defendant had a very good record of returning to court, that he always did return, and there was absolutely no danger from his point of view and certainly Shea, Gould wouldn't be representing a guy in this kind of a case that would be a fugitive.

And I think that fairly states what Mr. Newman said in the brief conversation, and I reiterated some of that to the Magistrate and I had said to him, "And I have represented other people that I would be loathe to say to a Court I believed would return. I had no hesitancy about making that representation to the Magistrate, of giving the bondsman my opinion that Mr. Rubinson would return, and that was based on the fact that I had been to his home, seen him with his children,

seen him with his infant grandchildren, and had no doubt in my own mind that he would return.

The Magistrate observed, and I think I recall exactly what he said, "Well, I suppose in some sense Shea, Gould might be morally liable if he were to run out on this $10,000, or morally responsible in some way. And those I think were the precise words of the Magistrate. It was just irrelevant really and nobody responded to it and that was the end of it. The Magistrate really asked about it as a matter of curiosity, not as a matter really having anything to do with the proceeding.

But at no time did I state, nor do I think anyone could reasonably imply from what I said in Mr. Rubinson's behalf, that the firm of Shea, Gould was standing behind his promise to pay Al Newman $10,000 as collateral for his bond.

Q Were you a member of the firm of Shea, Gould, Climenko, Kramer & Casey?

A Would that I were. I am not a member of that firm. And I recognize no authorize to make representations for the firm nor to bind the firm in any way.

MR. ELLIS: I have no further questions.

CROSS EXAMINATION

BY MR. WOHL:

Q Mr. Andrews, yesterday did Mr. Rubinson execute, did Mr. or Mrs. Rubinson execute a mortgage on the house?

A Not to my knowledge.

Q Did they turn over any cash to the bonding company?

A Not to my knowledge. I was present with Mr. Rubinson after and on in the marshal's office. I was present with him in the -- I just want to give you the basis for my statement.

I was with him in the Magistrate's office. I went with him from the Magistrate's office upon his release to the bondsman's office, where he signed documents which the bondsman requested him to sign. I did not review those documents. I did hear some conversation, however.

We then, since it had bee a long, grueling day which began for me in the office at 8:00 o'clock, went out and had a bite to eat in Chinatown and I left Mr. Rubinson knowing that he was going to go over to Mr. Newman's house, Mr. Newman convelescing from this surgery, to discuss with him the terms upon which he would provide

the collateral that he had agreed to make.

THE COURT: What time was this?

THE WITNESS: I believe we finished dinner, your Honor, at about 8:00 o'clock, and I remember Mr. Newman, when I spoke to him on the telephone, asked me to have Mr. Rubinson, if he could, pick up a Daily News for him and bring it because he didn't want to go out of the house, he didn't feel well. It was about 8:00 o'clock last evening when I left Mr. Newman and I and Mr. Grimes returned to my office, and I left my office at about 9:00 o'clock.

And my understanding was that Mr. Rubinson would go to Mr. Newman's home and make arrangements for paying the money.

Mr. Rubinson informed me that he didn't give him anything, that he had agreed to give him a deed in lieu of foreclosure when he arrived in Florida and that he would get the money from his mother-in-law to give him and send a check up immediately upon his return to Florida.

By the way, I instructed --

THE COURT: Wait a minute. You are talking so fast. Read those last two sentences, please.

(Record read)

THE COURT: What check?

THE WITNESS: A check for the $10,000 that the bondsman had required and that he had agreed to pay him.

And now I make this point because it comes in at what happened at the bondsman's office. I expressly recall -- I can't remember the language, but it was made clear by something that Mr. Rubinson or Mrs. Rubinson said that the house belonged to Mrs. Rubinson and the daughter, and I remember what went through my mind was that the judgment, which to me was a formality, was not adequate because of the daughter's interest in the house and that he would have to send up a deed in lieu of foreclosure to New York in order to really adequately protect the bondsman if it ever happened that he had to call upon the callateral.

MR. WOHL: I have no further questions.

MR. ELLIS: I have no further questions.

THE COURT: Thank you.

(Witness excused)

THE COURT: Anything further?

MR. ELLIS: No, your Honor.

MR. WOHL: Your Honor, the government would submit that we have a situation here where in effect what's

happened is that the bail bondsman has sort of informally decided that, for at least a period anyway, the defendant is to be at large on a personal recognizance bond, because that's in effect, all we have.

And consequently it is just exactly the type of situation where the Court has decided that he shouldn't be at large on a personal recognizance bond and that there is something additional that is required to insure that this defendant be present. And then he goes out and he accomplishes exactly the same thing because of some relationship with the bonding company.

And we would submit that under these circumstances the Court should be given an opportunity to evaluate the situation and decide whether or not this bail arrangement is a satisfactory arrangement, because it is certainly not what we would imagine the Court anticipated in ordering a $30,000 cash or surety bail, because normally that requires that the defendant actually put up some kind of real security before he walks out of the jail.

And that is our point here. I think it has been amply demonstrated in this hearing.

MR. ANDREWS: If it please the Court, may I be considered as to what I am going to say still

under oath in response to Mr. Wohl?

I instructed Mr. Rubinson last night not to leave this jurisdiction to go to Florida, because we had neglected to ask your Honor to fix his bail limitations so that they would permit him to go home to Florida. That's why he is here today, because --

THE COURT: Otherwise he would have been in Florida?

MR. ANDREWS: Yes, we intended to make that application of you this morning first thing. Mr. Wohl is a very early riser and I learned very early that he intended to ask you to conduct a hearing. Otherwise he would have been in Florida and these provisions would have been made today at the earliest possible practical opportunity.

Thank you, Judge.

MR. ELLIS: Your Honor, I just would like to address myself to this business of the personal recognizance bond.

As I understood it, and perhaps I'm wrong, but if the defendant had signed a mortgage on his house, that would have been satisfactory. But what he signed was a confession of judgment which Mr. Farley says becomes a lien on the property. So I therefore say to your Honor

you requested that $30,000 be put up. $30,000 has been put up by virtue of this confession of judgment.

So I think that everything that your Honor has asked for has been done and apparently the bail bondsman is satisfied, in taking that confession of judgment, that this means something to the defendant and to his wife, because it is the equity in their home.

Of course I might add: And he is here today.

THE COURT: The problem as I see it from what I've heard is that we still don't know what the bondsman has by way of security. Mr. Farley testified that Mr. Rubinson and his wife signed a confession of judgment. Mr. Andrews claims the daughter owns part of this house. Mr. Farley testified Mr. Rubinson told him he owned the house. Mr. Rubinson sat there and shook his head in the negative when Mr. Farley said that. And so I don't know if there is any surety at all or any security at all for his bond. That's the way it appears to me.

Of course Mr. Newman is a personal friend of Mr. Rubinson, is that it?

MR. ANDREWS: He may have met with Mr. Rubinson once. He knows Mr. Rubinson's family and his roots for forty years.

THE COURT: Who was doing all that talking about boyhood friends and all?

MR. ANDREWS: Mr. Newman recalled. In fact, I had to cut him short --

THE COURT: Recalled what?

MR. ANDREWS: He had to cut Mr. Newman short. But I was listening to him recalling the old days in Brownsville forty years ago where he knew Mr. Rubinson's father and Mrs. Rubinson's mother and father, and there was another mutual friend who is deceased, and he had apparently met Mr. Rubinson once many years ago. So there is no personal friendship. But he knew his people and he knew his roots.

THE COURT: There is no personal friendship, yet he wrote a bond for $30,000 for somebody he met only once, without any surety, without any collateral? I don't understand it.

MR. ANDREWS: I can't speak for him, Judge.

Perhaps the defendant can enlighten us. I just don't --

THE DEFENDANT: Could I explain it to your Honor?

THE COURT: If you want.

MR. WOHL: I submit that it should be under

oath if Mr. Rubinson is going to testify.

THE COURT: Take the stand.

N O R M A N R U B I N S O N , the defendant, called as a witness, being first duly sworn, testified as follows:

EXAMINATION BY

THE COURT:

Q Do you own this house, Mr. Rubinson? You shook your head no when Mr. Farley said under oath that you told him that you owned the house. I sat here and watched you shake your head in the negative as he testified under oath that you told him that you owned the house. Which is it?

A I'll explain that to you, your Honor. I do not own the house. When Mr. Farley asked me to sign it, I said, "Mr. Farley, my wife and my daughter own the house. She is here. She should sign this, too."

And he misunderstood. My wife and my daughter own the house and this is why I tried to clear it up and that's why I'm on the stand.

And that's exactly the way it is, your Honor. I explained that, that my wife should sign it, because he didn't ask my wife to sign it originally. I signed it

and then I said, "My wife should sign because she is going to give you the deed to the house." And that's exactly what it is. My wife was sitting in his office. That's exactly what it is.

Q What about this $10,000?

A The $10,000 came up while we were in the Magistrate's chambers and I said, "As soon as we get out I'll call my mother-in-law," which I did. There is a phone right outside the chamber and she said that she would deliver me the $10,000 to give to Mr. Newman.

That night when I went to see Mr. Newman he told me that he will tell me the correspondent in Florida to give the deed to for this public surety company and also to give them a check made out for $10,000 to the public surety company.

That is exactly the way it is. And I have every intention of, if you let me out, to go back to Florida and comply with Mr. Newman's request and I have no intention of going anywheres. I never did. I didn't know we were going to have a hearing this morning. I was available. I was called. I came down immediately. In fact, I was here, as the clerk here can tell you, before anybody else was here I was here, and I sat and I waited because I didn't know what time it was going to be.

THE COURT: Any questions by either side?

MR. WOHL: Yes. The government has a couple of questions, your Honor.

EXAMINATION BY

MR. WOHL:

Q When was the first time you heard about this $10,000 requirement to get out on bail?

A When I came to the Magistrate's office my wife said to me, "$10,000." I said, "For what?" She said, "I'll explain it to you. I'm all mixed up." And that's when Mr. Andrews explained to me, and also the other gentleman, Mr. Farley, that they would require an additional $10,000.

And then I went outside and I called my mother-in-law from the telephone right outside his chambers on, I don't know what floor it is, but there is a phone right outside, and I asked her and she said she would give it to me. So I told Mr. Andrews that she would give it to me.

Q Where is your mother-in-law going to get the $10,000?

A My father-in-law. The anniversary of his death. He died a year ago and left her a few dollars and this is the last she's got

Q How do you know that?

A How do I know it? We have been living together for over thirty years, thirty-three years we are living all together. We are one family.

THE COURT: Your mother-in-law lives with you in Florida?

THE WITNESS: Yes. We live in the same house -- we are in this house for twenty-five years. Prior to that -- we are married thirty-three and a half years, and out of that, with the time out in the Army, it is approximately thirty-two years we are living together as one family. And I have no intention of going anywhere.

Q When did your father-in-law die?

A A year ago today.

Q And how much is the insurance policy?

MR. ANDREWS: Objection.

MR. ELLIS: I object. I don't think this is at all relevant to this hearing.

THE COURT: Overruled.

The objection is overruled.

Q How much?

A Sorry. He did not have any insurance policy, to my best belief.

Q He didn't?

A He was a very frugal man. He did not believe in insurance. I think he once had a $1,000 policy and I don't know if he had that, because I know there was no collection on that $1,000 policy.

Q Right. Well, how much was his estate that he left your mother-in-law?

A He had no estate. He was a frugal man. He worked all his life. We lived together. He had no estate and he helped me out in the last few years and whatever he had left he left to his wife.

Q Do you know how much he left his wife?

A I don't really know, no, because my mother-in-law is seventy years old, seventy-one years old. She is not well herself and I never got into that with her. It is a touchy subject because my mother-in-law -- like I say, it is a year today. A few weeks ago there was an unveiling and it is a very difficult situation.

Q In this phone conversation that you had with your mother-in-law, tell us what you said to her and what she said to you.

A I said, "I am going to get out and the conditions of bail are a deed to the house and $10,000."

And she said, "I'll give it to you."

So I informed Mr. Neuman that night, the same

night, last night, that he would have the $10,000.

Q And was anything else said other than what you just said?

A To my mother-in-law?

Q Either to your mother-in-law in the phone conversation or by your mother-in-law in that phone conversation.

A No.

Q That was the entire conversation?

A No. We are, like I mentioned, Mr. Wohl, one family. She is like my own mother and I'm like her son. And, like I mentioned, it has been mentioned through the trial here, I'm married to the same woman and for thirty-three and a half years. I never went away yet and I don't any any intention of leaving.

Q Do you know where the $10,000 is that your mother-in-law is going to put up?

A I don't know. I know she has been holding money in the house and she has -- at that age, in the seventies, they are very secret: under this, in that, in a clothes drawer. I don't know. She lives on one side, in a room, and we eat together, we always eat together. Like I say, we are just one family, that's all. We always eat together and -- but I am not going to say to her, "Where

is your money?" I wouldn'tsay that to her, and I never looked for it.

Q Well, hasn't she given you money before?

A Yes. Every time my wife asked her, she gave to both of us.

Q Was that in cash or in checks?

A Well, she gave us cash. Most of it was cash. Like I say, these are people that are up in their age and weren't well, and whatever they kept, they kept like together. That's why we live together.

Q This call to your mother-in-law was after the meeting in the Magistrate's office, is that correct?

A Yes, sir.

MR. WOHL: I don't have any further questions.

EXAMINATION BY

MR. WOHL:

Q Mr. Rubinson, do you know how your wife and your daughter own the house?

A Yes, sir. That was -- last year --

Q No. What I mean is, I am trying to elicit from you whether they own it jointly or in common, or don't you know?

A I don't know the terms.

Q Okay. But, suffice it to say, each have an

interest in the house?

A Well, I put it that way because I didn't want -- you know, I wanted they should be taken care of somehow, you know.

Q I see. And your wife signed a confession of judgment?

A Yes. My wife is here today and she did.

Q As you sit there on the stand, you understand that if you leave the jurisdiction and don't come back your wife can lose the house?

A I would never do that. I understand that explicitly and I would never do it. Like I say, I was on my own recognizance. I never went anywheres. I came every day. Whenever Mr. Wohl called me in my home, he always found me there, and I came up when he asked me to come up. I never once told him I couldn't come up, I'm not coming up, and he can verify that. I always came. I never one time didn't show up. In fact I usually came an hour early.

MR. ELLIS: I have no further questions.

EXAMINATION BY

THE COURT:

Q Did you hear Mr. Andrews yesterday tell me all about how you were drinking and carrying on with

Sidney Stein up here in New York?

A Yes, ma'am, I did.

Q And all that kind of thing.

A Yes, ma'am, I did.

Q Is that true?

A Yes, ma'am. Unfortunately that's what happened. Unfortunately that's what happened. That's the truth.

THE COURT: All right. That's all.

(Witness excused)

THE COURT: What do you say, Mr. Wohl?

MR. WOHL: Your Honor, I would say we are pretty much where we started, in the sense that your Honor's observation is correct, that there hasn't been any security put up, and what we have is a confession of judgment of a man who has claimed high and low to everyone who will listen that he doesn't have any assets. He has effectively given away his house, his car and, the government would submit, anything else tangible that he had and he miraculously still manages to live in a rather pleasant style by anyone's standards, with his Rolls Royce and his four bedroom house, whether you call it a one-family house or not, and then --

THE COURT: Excuse me, Mr. Rubinson. What does your mother-in-law do for a living?

THE DEFENDANT: She is a very sick woman.

She has cancer. She has one breast removed. She can't work. She has never worked. She has high blood pressure. She never worked, your Honor. She has been sick.

THE COURT: Never worked in her life?

THE DEFENDANT: No, ma'am.

THE COURT: And you say your father-in-law didn't have any insurance, just $1,000 maybe?

THE DEFENDANT: I think he let that drop because he -- there was nothing ever collected.

THE COURT: I see.

THE DEFENDANT: Without me, your Honor, they were like destitute. This is why Judge Weinstein let me go to the Halfway House, I could get out and try and help these people that lived with me.

THE COURT: You say they are destitute?

THE DEFENDANT: They would be, without me now. It came to that.

THE COURT: I thought you said your father-in-law left your mother-in-law a lot of money and that's how she got $10,000.

THE DEFENDANT: I didn't say that. That's the end of it. In other words, if I left, there is nothing.

MR. WOHL: This is an excellent example,

your Honor. Within five minutes the man has on the one hand said that his mother-in-law keeps a stash of cash that he has never seen and now he is saying that that's the end of it and she doesn't have anything left. It is just a continuation of this evasive double-talking kind of information about this man's financial affairs.

MR. ELLIS: May I be heard, your Honor.

THE COURT: No. Just a moment, please. I am reading something.

(Pause)

All right. You may be heard now.

MR. ELLIS: Thank you, your Honor. I just want to comment on my friend Mr. Wohl's statement.

I don't think there has been anything evasive except in the ears of the hearer. I think what the testimony was was that the defendant's mother-in-law kept some money in the house. This was not stashes of cash with the inference that there are hundreds of thousands of dollars lying around the house.

He also said, I believe, that if she puts up the $10,000 and he flees, she is then destitute because she has nothing else. That's what he said.

Mr. Wohl may hear something different, but that's what he said.

Now, perhaps we should elicit from --

THE COURT: That's what he said after he got down from the stand. I asked what his mother-in-law did for a living. But, if you want, I'll have the reporter read back what he said about his mother-in-law and the money stashed here and there stashed around the house.

MR. ELLIS: I don't think it is necessary at this point, your Honor. Whatever he said he said and the record will speak for itself as to whether he said stashes of cash, with the inference that she had a lot of money. Perhaps we should get something straightened out and that is what --

THE COURT: Do you know that Mr. Andrews told me yesterday that somebody had paid him, Mr. Andrews, a fee to take an appeal for this defendant?

MR. ELLIS: I am given to understand that a fee has been paid to the firm of Shea, Gould to take that appeal, and I'm also given --

THE COURT: You don't know, you are not a member of the firm either?

MR. ELLIS: I am a member of the firm, yes, ma'am.

THE COURT: And you don't know whether that is so or not?

MR. ELLIS: I don't know as a fact, no, ma'am. With all due respect, your Honor, we have thirty-odd partners and really none of us know everything --

THE COURT: I'm talking about this case.

MR. ELLIS: This case I was brought into, I would say, about noontime today.

THE COURT: What did you say about that yesterday, Mr. Andrews?

MR. ANDREWS: I will try to recall what I said yesterday and I'll tell your Honor anything you would like to know about the retainer.

THE COURT: Somebody paid you a fee?

MR. ANDREWS: Not somebody. A fellow named Mario Pinto, a member of the Bar in the Country of Brazil in Latin America, a gentleman I think of substance and culture whom I have met, who employs Mr. Rubinson, which fact is verified by the probation report that was submitted before your Honor, a man who has known Mr. Rubinson for quite some time, apparently, I gathered from the conversation I had with him. He paid the fee, advanced it. I am not privy to his arrangement with Mr. Rubinson, but what was discussed before me led me to believe that Mr. Rubinson was responsible for that and that some day he would try and repay the man.

THE COURT: You say he worked for this man?

MR. ANDREWS: Yes, ma'am.

THE COURT: Doing what?

MR. ANDREWS: I don't know. Mr. Pinto is a businessman and he has a business in Miami Beach, which the probation department has verified as well. I noticed it in the probation report.

THE COURT: What do you do?

THE DEFENDANT: I am organizing a sales force for him, your Honor. They are going into the retail selling of all types of petroleum and metals.

THE COURT: Does he pay you?

THE DEFENDANT: I have been working gratis up until May 1st, and at this time, after May 1st, I get $1200 a month and more if everything works out. And the probation department came down --

THE COURT: Is that the only job you have?

THE DEFENDANT: Yes, ma'am.

THE COURT: What is the name of the company?

THE DEFENDANT: Brown, O'Shea & Company.

THE COURT: Brown, O'Shea?

THE DEFENDANT, Yes, ma'am.

And the probation department came down and visited with him.

MR. ANDREWS: I went to the place of business, your Honor, and I saw theman and I saw Mr. Rubinson working there. I have a letter agreement with Mr. Pinto, and Mr. Pinto did pay our retainer and has obligated himself to be responsible for any overage.

THE COURT: Well, you say,Mr. Rubinson, you have to get a check from your mother-in-law and you have to give a deed to Mr. Newman, is that it?

THE DEFENDANT: Yes, ma'am. That's correct, and this is why I asked Mr. Andrews last night if I could go back. He said,"No,I didn't get the bail limits extended to Florida, so don't go until I get to Judge Motley for an extension of bail." So I'm here. And as soon as I can go, it will be executed.

And I spoke to Mr. Newman and Mr. Newman told me that I should bring it to the correspondent there on Tuesday, if I can have it done by Tuesday. I said I'll have it done.

THE COURT: This is to the correspondent in Florida?

THE DEFENDANT: Yes. The same Public Service Casualty Company." Make the check out to Public Service Casualty," he told me, and also to bring the deed over to the correspondent. "I know his name begins with G,"

he told me. But he said he would give me everything before I went back. But he told me Giddings -- I don't remember the name.

THE COURT: You don't know the name of the correspondent?

MR. FARLEY: Richard Gladwell, your Honor, Miami, Florida.

THE DEFENDANT: I didn't remember. Giddings or Gladwell.

THE COURT: What I think should be done is that your wife, since you say she and your daughter own the house and have to give the deed, and your mother-in-law has the money, that that should be done by them before you leave the jurisdiction, because there is not any surety which has been given by you to Mr. Newman.

Isn't that so at this point?

THE DEFENDANT: No, nothing has been given by me. Mr. Newman said that I should -- you know, I'm afraid of one thing, your Honor. If I don't help and do it -- I'm not talking about people that know business. I'm talking about people that don't know how to handle it. I promise you I will not go away if you let me go back. I stand here and, like I say, I could have gone. I was never out on bail. This is the first time I have

had to post bail in my whole life. I never went away and I promise you, as sure as I'm standing here, I will not go away.

THE COURT: Your wife can take the deed over to the correspondent, can't she?

THE DEFENDANT: I'm sure she could, but like I say --

THE COURT: And she can get a check from her mother, can't she, to take it over there on Tuesday?

MR. ANDREWS: Is your Honor directing that he remain within the jurisdiction until those things are accomplished?

THE COURT: Yes.

MR. ANDREWS: Thank you, your Honor. Do you wish him to report by telephone or any other way to the Court?

THE COURT: He has to come in Tuesday and we'll see whether that has been accomplished.

MR. ANDREWS: Yes, your Honor.

THE COURT: 4:00 o'clock Tuesday.

MR. ANDREWS: May we make it earlier, your Honor? I have a schedule that is going to require me to be away from the courthouse at that time.

THE COURT: Away at 4:00 o'clock?

MR. ANDREWS: Yes, ma'am. I am supposed to go out of town on business at about mid-day.

THE COURT: How early can this be done? Your wife can do it Monday?

THE DEFENDANT: Yes. She can get -- I don't know what the legal requirements are. She can bring the deed. I don't know what kind of papers or how --

MR. ANDREWS: She can do it Monday.

THE DEFENDANT: She can? Okay.

MR. ANDREWS: He doesn't understand that preparing a deed is not a complex thing, your Honor. And I'm sure it can be done on Monday. And we can represent to the Court that that has been done by Tuesday morning.

THE COURT: Do you think that would be sufficient, Mr. Wohl?

MR. WOHL: Yes, that would be satisfactory to the government, your Honor.

THE COURT: You get the name of this correspondent and tell him to send you a wire on Tuesday that that is accomplished.

MR. ANDREWS: If your Honor please, Mr. Grimes is available to come at 4:00 o'clock on Tuesday, so that will be satisfactory.

THE COURT: All right.

MR. ANDREWS: Thank you, your Honor.

2030a Defendant Levine's Judgment

United States District Court for

United States of America vs.

DEFENDANT: Lawrence Levine

THE SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 74 Cr. 573

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: May DAY: 29 YEAR: 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL THOMAS ANDREWS (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a ~~first~~ verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with others to make use of means and instruments of transportation and communication in interstate and foreign commerce and of the mails to sell securities, at a time when no registration as to said securities was in effect with the United States Securities and Exchange Commission. (Title 18, United States Code, Section 371).

SENTENCE OR PROBATION ORDER

as charged in count 1.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS Imprisonment. EXECUTION OF SENTENCE IS SUSPENDED. Defendant is placed on Probation for a period of TWO (2) YEARS, subject to the standing probation order of this Court, and defendant is fined $10,000.00 to be paid within THIRTY (30) DAYS of this Judgment.

(Deft. is to stand committed until the fine is paid or defendant is otherwise discharged according to law)

SPECIAL CONDITIONS OF PROBATION

MICROFILM MAY 29 1975

DOCKETED AS A JUDGMENT # 75 486 ON May 30, 1975

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

A TRUE COPY RAYMOND F. BURGHARDT, Clerk By [signature] Deputy Clerk

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. DISTRICT COURT FILED MAY 29 1975 S.D. OF N.Y.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

CONSTANCE BAKER MOTLEY

[signature]

Date May 29, 1975

(117)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

74 Cr. 573 (CBM)

against :

NOTICE OF APPEAL

NORMAN RUBINSON, ET AL., :

Plaintiffs. :

----------X

S I R S :

PLEASE TAKE NOTICE that Larry Levine, one of the defendants in the above action, hereby appeals to the United States Court of Appeals for the Second Circuit from the Final Judgment entered in this action on the 29th day of May, 1975.

Dated: New York, New York
June 5, 1975

SHEA GOULD CLIMENKO KRAMER & CASEY

by _____
A Member of the Firm
Attorneys for Defendant Larry Levine
330 Madison Avenue
New York, New York 10017
(212) 661-3200

TO:

CLERK OF THE COURT
United States District Court
Southern District Court of New York
United States Court House
Foley Square
New York, New York 10007

PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Court House Annex
One St. Andrews Plaza
New York, New York 10007
Attn.: Frank H. Wohl, Esq. A.U.S.A

2032a Defendant Kaye's Amended Judgment

AMENDED

United States District Court for

United States of America vs.

DEFENDANT: PHILIP KAYE

THE SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 74 Cr. 573

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: July DAY: 3 YEAR: 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[ ] WITH COUNSEL (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

~~XXXX

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

:

-against- :

: 74 CR. 573

NORMAN RUBINSON, et al., :

Defendants. :

- x

APPEARANCES

SHEA GOULD CLIMENKO AND KRAMER
330 Madison Avenue
New York, New York

Attorney for defendants Levine and Rubinson

MORTON ROBSON
450 Park Avenue
New York, New York

Attorney for defendant Albert Feiffer

William Chester
Defendant pro se

DAVID KEEGAN
1000 Franklin Avenue
Garden City, New York

Attorney for defendant Reynolds

Appointment of Counsel

During pre-trial proceedings in this case, defendants Chester, Rubinson and Feiffer each moved for the appointment of counsel on the ground that he was "financially unable to obtain counsel." 18 U.S.C. § 3006A (b). These motions were renewed at the post-trial hearing held May 15, 1975. None of these defendants had requested counsel at the arraignment before Judge Knapp on June 17, 1974.[1/] Nevertheless, the court held a hearing on December 5, 6, and 20, 1974, and January 10, 1975 to determine these defendants' eligibility for appointment of counsel. Information with respect to financial status was also elicited at the conclusion of the trial in the course of bail applications. (Tr. 7439, et seq.) For the reasons stated on the record, the court found each of these defendants capable of employing adequate, competent private counsel and denied these applications. Ahaya v. Baker, 427 F.2d 73, 75 (10th Cir. 1970). Those reasons may be briefly summarized as follows.

Chester

The court found that defendant Chester was an attorney by profession and at the commencement of proceedings in this case had a salary of $25,000 a year working as a corporate counsel in Miami. (Tr. Dec. 5, 1974 at 6). Further, defendant Chester owned a house in Miami, in which, although mortgaged, he had an equity of $10,000. (Id. at 7; Tr. Dec. 6, 1974 at 81). The court concluded that these resources rendered the defendant financially capable of retaining counsel. Accordingly, the motion for appointment was denied. (Tr. Dec. 6, 1974 at 81).

Chester renewed his motion for appointment of counsel for purposes of appeal at the sentencing and post-trial hearing held May 15, 1975. Notwithstanding the fact that the defendant has lost his job due to his felony conviction, he has been retained until June 1, 1975 as a lawyer. Further, his wife works as a stewardess. He has no children to support. Finally, the evidence on the trial disclosed that Chester was one of the defendants who received large sums of money as a result of the sale of unregistered stock in the name of a previous wife, Frances

Roberts, and through the activities of a codefendant, Reynolds, for which there has not been an accounting. As noted above, Chester owns a home and may well have other resources gained with the still unaccounted for profits from the securities transactions which formed the basis of this indictment. For these reasons, the court concludes that the defendant is able to retain counsel and denies defendant Chester's post-trial motion for appointment of counsel on appeal.

Rubinson

With respect to defendant Rubinson the court found that he had been employed in the travel business (Tr. Dec. 6, 1974 at 76), that he had only a wife and a daughter in her twenties to support (Tr. Dec. 5, 1974 at 4-5) and that defendant had considerable equity (notwithstanding a $40,000 mortgage) in a house in Miami valued in excess of $65,000. (Tr. Dec. 20, 1974 at 16, et seq.) The court notes that Rubinson's answers with respect to his financial condition were pointedly evasive and impeded the court's development of this issue. Nevertheless, the court was able

to conclude, based on value of the home, that the defendant could afford counsel.

Further, there was evidence that defendant Rubinson had repeatedly insisted on representing himself despite the court's admonition to get a lawyer due to the complicated nature of the case. (Tr. Dec. 27, 1975, quoted in Tr. Dec. 6, 1974 at 65, et seq.) The court, at one point, sought to appoint counsel for Rubinson but this was before the court realized the application had been previously denied. After the court's recollection was refreshed and after a hearing the request for appointment of counsel was denied. At another point in the proceedings defendant Rubinson indicated that he had retained a Mr. Freeman to represent him and apparently it was only because Mr. Freeman became unavailable due to business commitments in Europe that Mr. Rubinson finally moved for appointment of counsel. (Tr. Dec. 6, 1974 at 165.) In sum, the court concluded that defendant Rubinson could afford counsel but had indicated that he intended to represent himself. In the court's view, defendant intelligently waived his right to counsel. United States v. Arlen, 252 F.2d 491 (2d Cir. 1958). Cf., United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971).

Accordingly, the court denied the motion. (Tr. Dec. 6, 1974 at 81 and 164-66.)

At the post-trial hearing and sentencing held May 15, 1975, the issue of appointment of counsel was renewed. Although the exact figures representing Rubinson's net worth varied slightly from those previously adduced, the court again concluded that Rubinson had been able to retain adequate counsel and that any alleged prejudice resulting from his having proceeded pro se at trial was part of the defendant's trial strategy and was not such as requires a new trial.

Feiffer

Finally, with respect to defendant Feiffer, although Feiffer and his retained counsel were present at various pretrial hearings at which appointment of counsel was discussed, it was not until the eve of trial that Feiffer's retained counsel sought appointment for himself under the Criminal Justice Act. Over the course of pre-trial proceedings there had been a suggestion that defendant Feiffer was under some financial strain. (See, e.g., Tr.

Dec. 5, 1974 at 13-14; Tr. Dec. 6, 1974 at 143; Tr. Jan. 9, 1975 at 132). On January 10, 1975 defendant Feiffer's lawyer asked to be relieved as counsel since the defendant had not paid him. Nor had counsel been paid by co-defendant Stein to whom he had been led to believe he could look for payment. (Tr.January 10, 1975, 4:30 session at 4) He also asked that counsel be appointed. (Tr. Jan. 10, 1975 at 152-53.) Upon inquiry, it was revealed that defendant Feiffer had considerable equity in his house in Miami Beach valued at about $75,000, notwithstanding a mortgage of $35,000 and a Small Business Administration lien of $20,000. (Id at 154) Further, the defendant had an estimated annual income of approximately $18,000 -- $20,000. (Id. at 160) On the basis of these resources, the court concluded that defendant Feiffer was able to retain counsel.

At the hearing on the renewed post-trial motion for appointment of counsel (held May 15, 1975) the court again concluded that defendant Feiffer had sufficient resources to retain adequate counsel. In particular, the court noted that defendant Feiffer still had (along with his wife) equity in a house and, as evidenced by copies of tax returns, had a gross income last year in excess of $15,000. He was

also expecting to receive a sizeable sum of money (several thousand dollars) in connection with a business transaction.

Feiffer's Claim of Immunity

Prior to trial defendant Feiffer moved to dismiss the indictment as against him on the ground that he had been promised prosecutorial immunity with respect to his dealings in Stern-Haskell stock, the subject of the instant indictment. The agreement which was allegedly made between his lawyer, Morton Robson, and an Assistant U. S. Attorney, Walter S. Rowland, was that if defendant Feiffer would plead to one count of a pending information relating to Radio Hill Mines securities, and would cooperate by giving useful information regarding Stern-Haskell stock, he would not thereafter be indicted in any criminal proceeding which might be begun in connection with the latter.

The court heard oral argument on this motion on December 5 and 6, 1974 and thereafter held an evidentiary hearing on January 8 and 9, 1975. The witnesses at the hearing included the defendant, Feiffer, his lawyer, Robson, an attorney employed by the Securities Exchange Commission who investigated Radio Hill Mines and to some extent Stern-

Haskell transactions, Michael Puder-Harris, Walter Rowland, and the Assistant U. S. Attorney who primarily handled the instant indictment, Frank Wohl. From a consideration of all the evidence produced at the hearing, the court denied the motion on the ground that no such promise as was claimed by the defendant had been made. In reaching this conclusion the court relied heavily on the following persuasive testimony.

(1) Rowland testified with certainty that no promise of immunity had been made. (See, e.g., Tr. Dec. 8, 1974 at 74) This conclusion was supported by further testimony to the effect that Rowland was not privy to the S.E.C.'s investigation of Stern-Haskell and consequently knew nothing of substance about the matter. (Tr. Jan. 8, 1975 at 79, 81 and 93) Further, Rowland was without authority to grant the alleged promise of immunity. (Id. at 93) Rowland admitted having encouraged Feiffer to talk to the S.E.C. authorities. (Id. at 75 and 84) This urging, however, was standard policy and was viewed as such by Rowland.

(2) Puder-Harris testified that no immunity had been arranged with Feiffer, (Tr. Jan. 8, 1975 at 108) but that

Feiffer nevertheless called and offered certain information regarding Stern-Haskell stock (Id. at 103 and 113). The witness was careful to note that nothing defendant Feiffer volunteered was helpful or unknown to the S.E.C. (Id. at 105) Finally the court notes that the Government identified a letter marked Exhibit 2 during its direct examination of Mr. Puder-Harris. The parties stipulated as to the relevant contents of Exhibit 2, to the effect that the S.E.C. in Washington referred the Stern-Haskell matter to New York for criminal prosecution on August 15, 1973 which was several months after the alleged promise was made, and was two months after Feiffer's guilty plea in Radio Hill Mines. (Id. at 101). The court accepts the logical inference from these dates, that is, it was unlikely that the Government would have promised immunity in a case which did not yet exist.

(3) Wohl testified that at no time did he promise immunity or agree with defense counsel that immunity had been granted. (Tr. Jan. 9, 1975 at 130, 132 and 135) The court notes that on the cross-examination of defendant Feiffer, it was brought out that the information which Feiffer did give was not considered truthful or useful by Mr. Wohl.

(Tr. Jan. 8, 1975 at 32) Thus, it was Wohl's position that no promise had been made; and even if a promise had been made, Feiffer failed to keep his end of the bargain which allegedly required Feiffer to cooperate by providing useful information about Stern-Haskell transactions.

In reaching the conclusion that no promise was made, the court was fully cognizant of the dictates of Santobello v. New York, 404 U. S. 257 (1971). To this end, there was considerable discussion as to whether or not memoranda to the file reflecting immunity promises are regularly prepared by the assistant U. S. attorneys. Although Wohl said that such practice was encouraged, he admitted that adherence to the procedure was uneven. (Tr. Jan. 9, 1975 at 128) Defense attorney Robson, a former assistant U. S. attorney, agreed with Wohl that the absence of a memorandum was of no significance. Finally, the court notes that, even if a promise had been made, the conclusion which must be drawn from the testimony is that Feiffer failed to keep his end of the bargain and is, therefore, in no position to invoke the alleged agreement. United States v. Nathan, 476 F.2d 456, 459 (2d Cir. 1973), cert. denied, 414 U. S. 823 (1973).

Government's Rebuttal Summation: Motion for a Mistrial or Judgment of Acquittal by Defendant Levine.

During his summation on behalf of defendants Wax and Levine, defense counsel Andrews made the following remarks.

> "Now, you know, you have learned from this trial that prior similar acts can be proven for certain purposes by the prosecution. You know that if someone does something which the prosecutor says is wrong, the prosecutor, under some circumstances, is entitled to show similar prior conduct for certain purposes, which Judge Motley will instruct you about when she charges you on the law.
>
> "But, nevertheless, they can show it, and they eagerly try to show it whenever they have it. You have never been shown and you have not during the trial been shown any prior similar conduct or relationship between Mr. Levine and Mr. Wax and anybody else in this case, particularly Sidney Stein.

"If they existed you would have been shown. Remember, Diston transactions were offered against some of these other men for reasons that Judge Motley will tell you. You never saw it here with them. The only relationship we know about in this case, and the only one that existed between Mr. Stein and Mr. Levine involved one transaction and that was the Blank Furniture deal. . ."
(Tr. at 6877 et seq.)

In response to these comments, the Government, by Mr. Wohl, in its rebuttal summation said the following:

"In addition, Mr. Andrews, after all of the evidence is in says there isn't any evidence that Mr. Levine or Mr. Wax were involved in any other transactions with Sidney Stein. Therefore, you should find, ladies and gentlemen, that this is a one-shot transaction, that all the rest of the time they were good little boys and they were never pulling off any frauds.

You certainly didn't hear him ask that question when Stein was on the stand, did you?

"Did you get into any other deals with Mr. Levine?

"Did you hear him ask that one. Did you hear him ask Mr. Kaye [a co-defendant who testified for the Government] whether there were any other deals with Mr. Levine or Mr. Wax? You sure didn't hear him ask that when the witnesses were on the stand. He didn't have the nerve to do that.

"Ladies and gentlemen, if you want to look at the evidence, you look at this evidence, the Lockwood blotter that is in evidence. [Gesture] Mr. Wax's trades are in evidence. You are going to hear about some other stocks. Do you remember the stocks that Sidney Stein testified were manipulated stock, Allen Electronics. Beta, Arthur Don Beau Giroux Watches, which Kravits testified to. Cadillac Knitting Mills, Calculator

Computer, David Auld, General Auto Parts, Fallon-Smith, the Greater Imperial stock, Landa Loric, Viking General? They are all in the record, ladies and gentlemen, of the stocks being manipulated and brought out on cross examination of the Government's witnesses. You didn't see him have the guts to ask that question when they were on the stand. Well, ladies and gentlemen, just look in Mr. Levine's blotter. If you are really interested in that, look at what Mr. Wax was selling his customers, if you are really interested in that, and you will find an answer to that particular problem, but the Government didn't present that originally, not because we didn't have it, not because we didn't particular [sic] want to focus on it, but because you should focus on the evidence that is related to Stern-Haskell and the Government submits that you should not be misled by suggestions as to what is not in evidence or suggestions that there is something that has been

left out because it isn't there."

(Tr. at 7096 et seq.)

Although it is not reflected in the transcript of the proceedings, all parties agreed that Mr. Wohl's remarks were accompanied by a gesture in which he picked up Exhibit 500 (the "Lockwood blotter") to give added emphasis to his comments.

The court had previously ruled that counsel were not to interupt summations. (This ruling was made in view of the tendency of pro se defendants Rubinson and Chester to disrupt the proceedings despite admonishments by the court, as the record reflects.) Accordingly, Andrews and other defense counsel waited until the jury had been charged to make their objections to the Government's rebuttal summation. Insofar as defendant Wax was acquitted on all counts, and insofar as prejudice, if any, was therefore limited to defendant Levine who was convicted only of the conspiracy count (Count 1), the following discussion focuses exclusively on Levine.

As the court understands it, the thrust of Andrews' summation (quoted supra) was to point out that, although

the Government had introduced evidence of prior similar acts involving fraudulent securities transactions as to other defendants, no such evidence had been introduced as to defendant Levine. The obvious significance of the comment was to imply to the jury that since no prior similar acts had occurred, it was unlikely that Levine had committed the fraud charged in the instant indictment with respect to Stern-Haskell stock. To counter this remark, the Government, in its rebuttal summation, gestured to the Lockwood blotter and simultaneously suggested that had the Government sought to establish prior similar acts, it could easily have done so by reference to the blotter. Thus, the impact of this summation was that if one were to examine the contents of the Lockwood blotter, evidence establishing prior similar acts by Levine could be found.

Defense counsel objected to the Government's remarks as inaccurate and prejudicial, and hence a violation of due process. In particular, defense counsel claimed that reference to the blotter was error because, but for a few pages which supplied the basis of a Government chart which was displayed throughout much of the trial, the blotter

was not in evidence. Further, defendant argued that even if it were in evidence, the blotter merely recorded securities transactions on behalf of certain customers and without more did not establish fraudulent transactions which could be characterized as prior similar acts. This was so, notwithstanding the fact that the witness co-defendant Stein — who has admitted to fraudulent dealings in over 200 stocks — had testified that certain stocks were "rigged" and transactions in those same stocks happened to be recorded in the blotter.

During oral argument it became obvious that the parties had a disagreement as to the admission of the blotter. Apparently there had been a misunderstanding between the Government and defense counsel in which the Government had intended to introduce the blotter both to support the chart and for other purposes (T. at 7343), whereas defense counsel unanimously understood that only the pages reflecting trading in Stern-Haskell stock were to be admitted and stipulated to its admission on these terms. (Tr. at 7358) The court notes that the pages reflecting Stern-Haskell trading had not been removed from the blotter nor

had large portions of the blotter been redacted since, given the large size of the document, both techniques for limiting the portion admitted would have been somewhat impractical. Eventually, the parties agreed that only the Stern-Haskell pages ~~had been~~ would be admitted, but the Government nevertheless continued to deny that its comments were inaccurate.

The Government's position, as clarified, was that although there was no evidence of prior similar acts in the record (since the bulk of the Lockwood blotter was not in evidence), the Government could have proved a course of fraudulent transactions between Levine and Stein. This was what the Government had intended to convey to the jury in its rebuttal summation. The Government noted, for example, that fraud could have been proved as to dealings in Eastern Diversified securities, and that Wax and Levine had invoked the Fifth Amendment during proceedings before the S.E.C. (Tr. at 7402) Of course, this evidence is not conclusive of fraud or prior similar acts by defendant Levine. Other evidence which the Government possessed and might have introduced, however, may have proved more convincing.

After the jury had deliberated some eight hours, and during the colloquy with respect to what portions of the blotter were in evidence, the jury sent out a note (Court's Exhibit 10, Trial Tr. at 7353) asking to see the blotter, Stein's list of over 200 stocks which he had rigged, a complete list of exhibits admitted into evidence, and Stein's psychiatric records. Since Stein's list was not in evidence, and no complete list of exhibits admitted had been maintained, the jury's request for these items was denied. The jury was given the psychiatric records. (Tr. at 7387) With respect to the Lockwood trading records, the court told the jury that the attorneys "now agree" that those records are in evidence for the underlying data which supports the summary chart exhibits in evidence. The court then advised the jury that if it wanted those pages, they could be permitted to take them out of the ledger book. (See, United States v. Adams, 385 F.2d 548 [2d Cir. 1967]) Juror Number 11, who was the only one to volunteer a remark, replied "I don't think so." (Tr. at 7387-88) Apparently the jury was satisfied with the court's explanation.

Nevertheless, counsel out of the presence of the court continued to discuss the matter and eventually

stipulated to a proposed additional instruction which they felt would cure the situation. The court, in its discretion, declined to give the instruction noting that the jury had accepted the court's explanation in hesitating to submit the blotter, and had not renewed the request. Further the court concluded that to instruct at that point would exacerbate rather than solve the problem. (Tr. at 7388-89) The jury was then excused for the night.

The next day, the discussion was renewed. It was during this colloquy that the Government clarified its position and conceded that no evidence had been introduced which established prior similar acts between Levine and Stein. (Tr. at 7399-7401, and 7408) This position contrasts with that of the previous day in which the Government had indicated that there was at least some evidence in the record of prior similar acts. Due to this concession, the court was reconsidering giving the proposed further instruction when the jury returned a verdict. (Tr. at 7421)

For the reasons which follow, the court concludes that a mistrial as to defendant Levine should not be declared or a judgment of acquittal entered. In so concluding, the court is fully aware that this is an extremely close question.

This is not a case in which the prosecution pursued a course of misconduct or impropriety such as warrants a mistrial. Cf., United States v. Drummond, 481 F.2d 62 (2d Cir. 1973). Indeed, the Government here presented a well-reasoned, temperate, and methodical case.

Nor does the court believe that the Government's remarks were an intentional misrepresentation. The court finds that the prosecutor was momentarily confused by matters outside the record. Finally, the Government's rebuttal summation was not the kind of sensational event which can sometimes cause a mistrial. See, United States v. Socony-Vacuum Oil Co., 310 U. S. 239, 242 (1940).

The court notes that in contrast to cases in which the Government's comments in summation are "ill-conceived" but not objected to, e.g., United States v. White, 486 F.2d 204, 207 n.9 (2d Cir. 1973), cert. denied, 415 U. S. 980 (1974), defense counsel in this case vigorously objected to the remarks and sought curative instructions which the court was considering when the jury returned a verdict. Further, the court notes that when evidence of prior similar acts is admitted to prove either the conspiracy count in an indictment, United States v. Stadter, 336 F.2d 326 (2d Cir.

1964), cert. denied, 380 U. S. 945 (1965), or as evidence of intent, United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971), the trial court is well advised to give a limiting instruction on the use of such evidence, particularly when requested to do so. United States v. Miller, 478 F.2d 1315, 1318 (2d Cir. 1973), cert. denied, 414 U.S. 851 (1974). The court's instructions are designed to warn the jurors of the limited relevancy of the evidence. Here, the Government's failure to properly introduce evidence of prior acts deprived the court of the opportunity to so instruct the jury. In sum, the Government's references to prior similar acts in its rebuttal summation were not attended by the safeguards of evidence actually admitted, nor a limiting instruction. There was potential for prejudice.

Nevertheless, the court concludes that the Government's remarks were not so prejudicial as to require a new trial. The comment in summation was but one remark during the course of a lengthy, complicated eight week trial. The Government was allotted 3 hours for summation. There were eight defendants on trial, two of whom represented themselves. Each defendant was allotted two hours for summation.

As noted above, the jury was advised that the lawyers had agreed that the entire Lockwood Blotter was not in evidence and it did not persist in its request to see the Blotter, nor presumably did the jury rely on the Blotter. It was also advised that a list which it requested of stocks referred to by Sidney Stein and about which he was cross-examined at greath length by defense counsel, the list being Jencks Act material, was not in evidence.

In the court's view, the proof of guilt as to defendant Levine was clear. There was the testimony of co-defendant Stein that he dealt directly with Levine and met with him on several occasions. The jury was free to believe that testimony. There was also the testimony of co-defendant Phillip Kaye to the effect that he gave money given to him by Stein directly to Levine. There was, in addition, the testimony of an expert witness, relating to stock transactions by Levine resulting in increases in the price of Stern-Haskell stock during the period in question.

In passing, the court also notes that the proof as to defendant Wax — a co-defendant associated with Levine and thus somewhat similarly situated — was not as

weighty, was at times equivocal and the jury demonstrated its intelligence on this score by acquitting defendant Wax.

In short, the prejudicial effect of the prosecutor's remarks must be assessed by reference to the possibility of prejudice to any particular defendant and in light of the proof of guilt present in the whole case. United States v. Bivona, 487 F.2d 443, 447 (2d Cir. 1973). Under this standard, the court has concluded that overwhelming prejudice was unlikely and that the proof of Levine's guilt was clear enough to dissipate any harm done by the Government's reference to prior similar acts of which there was no proof in the record.

Proof Established A Single Conspiracy

Defendants Levine and Rubinson claim that the court should have charged the jury on several rather than one conspiracy and that this alleged failure is grounds for a mistrial. The court does not agree. The proof adduced at trial clearly established a single conspiracy to sell Stern-Haskell stock to the public through fraudulent devices.

The proof established that various fraudulent and illegal devices were employed including failure to register the stock and the use of a variety of undisclosed and improper mechanisms to influence the price of the stock. The fact that various devices were employed by various defendants does not necessarily divide one conspiracy into multiple conspiracies.

The law in this Circuit is well settled that a division of labor among co-conspirators does not prevent the facts as developed at trial from being viewed as one conspiracy. See, United States v. Miley, ___ F.2d ___ (2d Cir., decided March 19, 1975) (Dkt. No.); United States v. Tramunti, ___ F.2d ___ (2d Cir., decided March 5, 1975) (Dkt. No. 74-1560). The court concludes that its charge — that the jury should acquit any defendant not found to have been a member of the single conspiracy — was appropriate under the circumstances of this case.

Weitzman's Testimony Regarding Rubinson's and Feiffer's Criminal Record

Defendants Rubinson and Feiffer have moved for a new trial claiming that certain remarks by the witness, Saul Weitzman, with respect to the prior criminal convictions of Stein, Rubinson and Feiffer were not admissible, and even if admissible, were so prejudicial that the defendants were denied a fair trial. In particular, during Rubinson's cross-examination of Weitzman, Weitzman testified (when asked why he had not returned certain documents to Rubinson) that he was collecting evidence to establish that he was not a criminal like Stein, Rubinson and Feiffer. Weitzman added that Rubinson had been convicted of perjury and implied that Rubinson had served time in jail.

In the court's view, Weitzman's statement was admissible as responsive to Rubinson's line of questioning or, alternatively, to impeach Rubinson's many "factual" statements to the jury that he, Rubinson, was a person of good character and most assuredly a creditable person. The court notes that neither Rubinson pro se nor Feiffer through counsel requested any additional curative instruction with

respect to Weitzman's remarks. In fact, when the Government suggested such an instruction, defense counsel did not join in the proposed. (Tr. 6709). The court concludes that in view of the overwhelming evidence against defendants Rubinson and Feiffer, and in view of the fact that the defendants did not request the court to admonish the jury to disregard the remark, no prejudice resulted from Weitzman's remarks. United States v. Maxwell, 383 F.2d 437, 444 (2d Cir. 1967).

Feiffer's Claim of Insufficient Indictment With Respect to the Conspiracy Count (Count One).

Defendant Feiffer has moved to dismiss the indictment on the ground that the indictment with respect to the conspiracy count is insufficient. Federal Rules of Criminal Procedure, Rule 7(c). The court denies the motion. In the court's view, the policies underlying the specificity requirement were satisfied by the instant indictment. More particularly, the court finds that the indictment has enough detail to provide the defendants (including Feiffer) with protection against double jeopardy and that they were on

notice of the charges which were tried. See, United States v. Tramunti, ___ F.2d ___ (2d Cir., decided March 5, 1975) (Dkt. No. 74-1560). See, generally, United States v. Silverman, 430 F.2d 106, 109-12 (2d Cir. 1970).

Chester's Claim of Inconsistent Verdicts

Defendant Chester was acquitted of the conspiracy count (Count One) but was found guilty on one substantive count (Court Fourteen). Chester has moved for a new trial claiming that the jury's verdicts are inconsistent. Assuming that the outcome complained of is inconsistent, "[i]t is well settled that even plainly inconsistent jury verdicts, simultaneously rendered are the jury's prerogative." United States v. Zane, 495 F.2d 683, 690 (2d Cir.), cert. denied, 43 U.S.L.W. 3239 (Oct. 21, 1974). To hold otherwise would invite unwanted and unverifiable speculation into the operation of the jurors' minds and the course of their deliberations.

In Zane, supra, the Second Circuit upheld a jury finding of guilt on a substantive count and innocence on the conspiracy count. For the reasons noted in Zane, this

court too concludes that a finding of not guilty does not bar conviction on a substantive count and accordingly denies Chester's motion for a new trial.

Defendants Claim That Limitation on Cross Examination and Argument Was Improper.

Defendants Rubinson and Levine claim, on behalf of all defendants, that the court erred by limiting each defense counsel's cross-examination to two hours and restricting each defense counsel's recross examination to one half hour. As noted above, there were eight defendants on trial, two of whom were representing themselves.

The court imposed the limitations after the first few Government witnesses had testified and after one of them, Nordin, had testified for four days under often redundant cross examination. The times fixed by the court allowed for fourteen hours of cross examination and three and one-half hours of recross examination of each Government witness. This allowed sufficient time to fully develop all facts and adequately attack any witness' credibility. In addition, the court granted defense counsel additional time on several occasions.

Defense counsel failed to point to any specific matter which they were prevented from developing by the court's time limitations. Indeed, the record on this case reveals full and vigorous cross examination of Government witnesses. Accordingly, the court concludes that the defendants were not in any way prejudiced by the time limitations imposed by the court.

Rubinson and Levine's Claim of Prejudice
As a Result of Pre-Indictment Delay

Defendants Rubinson and Levine have renewed their motion, made originally prior to trial, that they were denied a fair trial because of pre-indictment delay in this case. The defendants have not, however, been able to point to any significant prejudice resulting from the elapsed time between the offense and the date of the indictment.

Defendants' assertions of pre-trial prejudice, based on the absence of Nordin and the death of Leo Silber, were shown to be entirely without foundation when Nordin testified as a Government witness and no reason was given to show why Silber, who is, in fact, still alive, would be

a valuable defense witness. Moreover, defendants general claim that the undue delay clouded the memories of various witnesses is unsupported by the record. Accordingly, the defendants' motion that they were denied a fair trial because of pre-indictment delay is denied.

Rubinson's Claim of Prejudice As a Result of Unauthorized Communication Between Defendant Haskell and a Juror

Defendant Rubinson claims that Defendant Haskell's unauthorized conversation with a juror was prejudicial to him.

Defendant Haskell's conversation with the juror was brought to the attention of all of the defendants during the trial. None of them chose at that time to challenge the juror, despite the fact that it was pointed out to them that defendant Haskell's communication could be regarded as reflecting poorly on the other defendants. In addition, the juror told the court that she could still decide the case fairly without reference to the conversation. Having chosen to retain the juror at the time he was fully apprised of the conversation and the possible resultant

prejudice defendant Rubinson cannot now claim such prejudice.

Defendant Rubinson's Claim That the Court Erred By Excluding Defendants' Offers of Other Securities Transactions

Defendant Rubinson claims that the court was in error in excluding proof of certain other securities transactions offered by the defendants. The defendants claim that the fact that they had engaged in other spin-offs which were not attacked in some way established that their conduct in connection with Stern-Haskell was lawful.

Defendants' proof of other spin-offs which had not been challenged by the Government was irrelevant because none of the other transactions involved National Ventures nor was there any proof that the other transactions included any of the fraudulent features relied on by the Government to establish the illegality of the Stern-Haskell spin-off. Because the fact that the defendants had engaged in other corporate spin-offs which had not been

attacked by the S.E.C. was not relevant to the issues at trial, defendants' offers of proof of other such transactions was properly excluded.

Dated: New York, New York

July 28, 1975

CONSTANCE BAKER MOTLEY
U. S. D. J.

2067a Rubinson's Financial Affidavit

FINANCIAL AFFIDAVIT

(CJA 23)

IF BOARD OF ELECTION OR ATTORNEY ENTER DESIGNATION OF OTHER COURT SERVICES WITHOUT PAYMENT OF FEE

IN UNITED STATES ☐ MAGISTRATE ☒ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF U. S. vs. Rubinson

FOR So Dist of N.Y.

AT

LOCATION NUMBER

PERSON REPRESENTED (Show your full name) NORMAN RUBINSON

1 ☒ Defendant—Adult
2 ☐ Defendant—Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify)

DOCKET NUMBERS
Magistrate
District Court
Court of Appeals

CHARGE/OFFENSE (describe if applicable & check box →) Sec Law Violation ☒ Felony ☐ Misdemeanor

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

EMPLOYMENT

Are you now employed? ☐ Yes ☒ No ☐ Am Self Employed

Name and address of employer:

IF YES, how much do you earn per month? $ —

IF NO, give month and year of last employment
How much did you earn per month $ 4000. Self Emp' 1969

If married is your Spouse employed? ☐ Yes ☒ No

IF YES, how much does your Spouse earn per month $ —

If a minor under age 21, what is your Parents or Guardian's approximate monthly income $ —

OTHER INCOME

Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments, or other sources? ☐ Yes ☒ No

IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY THE SOURCES

RECEIVED	SOURCES
$	

CASH

Have you any cash on hand or money in savings or checking account ☐ Yes ☒ No IF YES, state total amount $

PROPERTY

Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? ☐ Yes ☐ No

IF YES, GIVE VALUE AND DESCRIBE IT

VALUE	DESCRIPTION
$ 2000	aprox value of Stocks

ASSETS

DEPENDENTS

MARITAL STATUS
☐ SINGLE
☒ MARRIED
☐ WIDOWED
☐ SEPARATED OR DIVORCED

Total No. of Dependents: 1

List persons you actually support and your relationship to them

DEBTS & MONTHLY BILLS

(LIST ALL CREDITORS INCLUDING BANKS, LOAN COMPANIES, CHARGE ACCOUNTS, ETC.)

Creditors	Total Debt	Monthly Payt.
APARTMENT OR HOME:	$	$
Numerous - approx total Creditors	$ 100,000 -	$
	$	$
	$	$

LIABILITIES AND DEBTS

I certify the above to be correct.

SIGNATURE OF DEFENDANT (OR PERSON REPRESENTED) Norman Rubinson

WARNING: A FALSE OR DISHONEST ANSWER TO A QUESTION IN THIS AFFIDAVIT MAY BE PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH

2068a ' Documents of Defendant Rubinson Attempted to be Offered in Evidence

ALLEN ELECTRONIC INDUSTRIES, INC.

2301 NORTH MIAMI [illegible] ENUE, MIAMI, FLORIDA 33127

Letter Dated June 15, 1968 Entitled Notice of Declaration of Stock Dividend

June 15, 1968

NOTICE OF DECLARATION OF STOCK DIVIDEND

To the Stockholders:

The Board of Directors of your company, by acquisition, through an exchange of 26,000 shares of Allen Electronic Industries, Inc. stock obtained 100% of the outstanding stock of YACHT HARBOR ISLAND, INC. on March 21, 1968. On June 12, 1968, YACHT HARBOR ISLAND, INC. changed its name to CALCULATOR-COMPUTER LEASING CORP. The change of name has had no material effect on the assets or the operations of the corporation as of the date of this dividend.

Since the time of this acquisition, your Board of Directors has determined that it does not desire to continue in the water-front lot retail sales promotion, and, therefore, has:

> On June 15, 1968, declared a stock dividend of 100% of the Common Stock of CALCULATOR-COMPUTER LEASING CORP. (formerly YACHT HARBOR ISLAND, INC.), payable July 1, 1968, on a share for share basis to the stockholders of Allen Electronic Industries, Inc. stock, as of record at the close of business June 22, 1968.

CALCULATOR-COMPUTER LEASING CORP. (formerly YACHT HARBOR ISLAND, INC.) has never been publicly traded and there is no known market for the stock.

Allen Electronic Industries, Inc. has, since the time of acquisition, carried the assets of CALCULATOR-COMPUTER LEASING CORP. (formerly YACHT HARBOR ISLAND, INC.), on its records for $104,000.00. Since the company has, as of this date, 933,500 shares of stock issued and outstanding, it considers this stock dividend to be of a value of $.11 per share.

The Balance Sheets and Income Statement for the year ended April 30, 1968, of CALCULATOR-COMPUTER LEASING CORP. (as of that date, YACHT HARBOR ISLAND, INC.), is hereby enclosed.

Very truly yours,

Arthur Dash

Enclosures

Arthur Dash
Treasurer

EXHIBIT "H"

CALCULATOR COMPUTER LEASING CORPORATION

230 North Miami Avenue, Miami, Florida

2069a Rubinson Documents
Notice to Stockholders Dated November 27, 1968

November 27, 1968

To the Stockholders:

Recently, your Company, for issuance of 3,916,500 shares of the authorized and unissued stock of its capital stock has acquired all of the issued and outstanding stock of 1,000,000 shares of PHOTO-SCAN CORPORATION, a Delaware corporation authorized to do business in the State of California and engaged in the manufacture and distribution of crime-deterrent equipment consisting of closed circuit television and monitoring equipment.

The PHOTO-SCAN CORPORATION stock has never been publicly traded, and there is no known present market for its stock.

The new Board of Directors and Officers are as follows:

Ronald C. Hibbard, President and Chairman of the Board.

General Gregory Weissenberger, Vice-President and Director.

Emanuel Warner, Secretary and Director.

CALCULATOR COMPUTER LEASING CORP.

by _____
RONALD C. HIBBARD, President and
Chairman of the Board of Directors

EXHIBIT "B"

2070a Rubinson Documents
Notice of Special Meeting of Stockholders

CALCULATOR-COMPUTER LEASING CORP.

683 N. E. 69th Street
Miami, Florida 33138

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

Notice is hereby given that a Special Meeting of the Stockholders of Calculator-Computer Leasing Corp. has been called by Resolution of the Board of Directors to be held at the office of the corporation in the City of Miami, Florida, on the 17th day of December, 1968, at 1:00 P. M., E.D.T. for the following purposes:

To consider and vote upon the adoption of the following proposed amendments to the certificate of incorporation and By-Laws.

RESOLVED:

THAT the authorized capital stock of Calcuator-Computer Leasing Corp. be increased from 5,000,000 shares of the par value of $.10 each, to 20,000,000 shares of the pr value of $.10 each, so that the authorized capital stock of said corporation shall hereafter be 20,000,000 instead of 5,000,000.

RESOLVED:

THAT the By-Laws of the corporation be amended so as to provide for the election of five (5) members of the Board of Directors of the corporation isntead of the present three (3) Members of the Board of Directors.

And, for the transaction of any and all business pertaining thereto or necessary in connection therewith by order of the Board of Directors, this 3rd day of December, 1968.

CALCULATOR-COMPUTER LEASING CORP

by _____
Ronald C. Hibbard, President and
Chairman of the Board of Directors

EXHIBIT "C"

2071a Rubinson Documents
Letter from SEC to Marc A. White, Esq.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

AUG 23 1968

Marc A. White, Esquire
1700 K Street, N. W.
Washington, D. C. 20006

Re: Calculator-Computer Corporation

Dear Mr. White:

This is with reference to your letter of August 2, 1968 requesting a no action letter for the sale of 21,000 shares of the stock of Calculator-Computer ("Calculator"), a Delaware corporation which was issued as a stock dividend on 21,000 shares of Allen Electronics Industries, Inc. ("Allen"), a Delaware corporation which Mr. Thomas L. Marshall owned under an investment letter.

Mr. Marshall received the 21,000 shares of Allen in connection with the sale of land to Allen, and he agreed upon the receipt of the shares to hold them for investment. In June of this year, Allen declared a stock dividend on a one for one basis to all shareholders, and issued Mr. Marshall 21,000 shares of Calculator as a dividend. These shares contained a legend preventing their sale without compliance with the Federal Securities laws.

You state Mr. Marshall is neither a director, nor officer of Allen or of Calculator and has no influence or control over the management of either company.

On the basis of the facts presented, this Division will not recommend any action to the Commission if the shares held by Mr. Marshall are sold without compliance with the registration requirements of the Securities Act of 1933 in reliance upon your opinion as counsel that the proposed transaction is exempt therefrom.

Sincerely yours,

John Heneghan

John Heneghan
Assistant Chief Counsel
Division of Corporation Finance

2072a Rubinson Documents. Letter from Germaise Cooper & Quinn to Board of Directors of Allen Capital Corp.

Germaise, Cooper & Quinn
Counselors at Law
717 Fifth Avenue
New York, N.Y. 10022

IRWIN L. GERMAISE
JEROME COOPER (N.Y. AND FLA.)
THOMAS F. QUINN

TELEPHONE
(212) 421-9605
CABLE ADDRESS
"JIGTHAW" NEW YORK
MIAMI OFFICE
2650 BISCAYNE BOULEVARD
MIAMI, FLORIDA

January 14, 1969

Board of Directors
Allen Capital Corp.
2301 North Miami Avenue
Miami, Florida 33127

Attention: Norman Rubinson

Gentlemen:

With respect to the status, transferability and registration requirements pertaining to 311,000 shares of Common Stock of CALCULATOR-COMPUTER LEASING CORP. (hereinafter referred to as "Calculator-Computer"), presently owned by Allen Capital Corp. (hereinafter referred to as "Allen"), the following discussion and opinions are presented in the light of the Securities Act of 1933, as amended, 1/ the Rules and Regulations promulgated thereunder 2/ and the applicable judicial and administrative decisions and interpretations relative thereto.

The relevant facts and circumstances which you have related to me, hereinafter under discussion and solely upon which I will render an opinion, are as follows:

STATEMENT OF FACTS

"In December 1967, Allen Capital Corp. (a Florida corporation) exchanged certain properties with Aquafilter Corporation (a Delaware corporation) in consideration of 625,000 shares of Common Stock of Aquafilter. By virtue of the foregoing transaction, Allen Capital Corp. ('Allen') became a 'control' shareholder of Aquafilter and caused the name of Aquafilter to be changed to Allen Electronic Industries, Inc.

"It is noted that Norman Rubinson, who became Chief Executive Officer and a Director of Allen Electronic Industries, Inc., is the sole stockholder of Allen Capital Corp.

1/ 15 U.S.C. 77a, et seq.
2/ 17 C.F.R. 230.100 et seq.

Board of Directors
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"By virtue of certain 'private transactions,' Allen Capital Corp. possessed 321,000 shares of Allen Electronic Industries, Inc. as of June 22, 1968. These 'private transactions' included the transfer of an aggregate of 150,000 shares to three (3) persons who rendered services to Allen Capital Corp. (50,000 shares to each), and who were compensated by such conveyance of shares and the sale of 100,000 shares for a cash consideration, such transfer on an 'investment basis.'

"Under date of June 15, 1968, Allen Electronic Industries, Inc. distributed to its stockholders a 'Notice of Declaration of Stock Dividend' (a copy of which is appended hereto and designated Exhibit 'A'). In brief, the 'Notice' announced that Allen Electronic Industries, Inc. obtained 100% of the outstanding shares of Yacht Harbor Island, Inc. in payment (exchange) for 26,000 shares of its Common Stock. The transaction was consummated on March 21, 1968. On June 12, 1968, Yacht Harbor Island, Inc. changed its name to Calculator-Computer Leasing Corp.

"The June 15th 'Notice,' in addition to stating the aforesaid facts concerning corporate activity, set forth that as of the date of the 'Notice,' Allen Electronic Industries, Inc. (through its Board of Directors), had declared a stock dividend of 100% of the Common Stock of Calculator-Computer Leasing Corp., which dividend was payable on July 1, 1968 to Allen Electronic stockholders of record as of June 22, 1968.

"You inform me, and as stated hereinabove, as of the record date stated in the June 15th 'Notice,' viz., June 22, 1968, Allen Capital Corp. was the owner of 321,000 shares of Allen Electronic Industries, Inc. and by virtue thereof was eligible for and received as a dividend a like amount of shares of Calculator-Computer Leasing Corp., namely, 321,000 of such 'spun-off' shares.

"In November 1968, Calculator-Computer Leasing Corp. acquired all of the issued and outstanding shares of Common Stock (1,000,000 shares) of Photo-Scan Corporation (a Delaware corporation), in consideration of the issuance of 3,916,500 shares of authorized but unissued shares of Calculator-Computer. The shares were exchanged by Calculator-Computer with the shareholders of Photo-Scan and by virtue of the mathematics of

Board of Directors
Allen Capital Corp.

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such exchange, the former shareholders of Photo-Scan came into 'control' of Calculator-Computer and chose their own Board of Directors. An announcement stating the foregoing was sent by Calculator-Computer to its shareholders under date of November 27, 1968 (a copy of the Notice is attached hereto and designated Exhibit 'B').

"At the time of the above set forth exchange, Calculator-Computer had 1,083,500 shares of its Capital Stock issued and outstanding, of which Allen Capital Corp. owned of record 321,000 shares.

"A 'Notice of Special Meeting of Stockholders' was sent by Calculator-Computer Leasing Corp. to its stockholders on December 3, 1968 announcing such 'Special Meeting' to be held on December 17, 1968 (a copy of the 'Notice' of such 'Special Meeting' is attached hereto and designated Exhibit 'C').

"The 'Special Meeting' was for the purpose of considering and voting upon a recapitalization of the shares of the Company and also to vote upon an amendment to the By-Laws regarding the number of Directors to serve upon the Company's Board.

"The 'Special Meeting' was convened and the corporate business transacted.

"A further 'Stockholders' Meeting' of Calculator-Computer was called for January 9, 1969, pursuant to 'Notice' of December 19, 1968 (copy of 'Notice' is appended hereto and designated Exhibit 'D'). This meeting considered and affirmatively voted upon a merger between Calculator-Computer and Pittsburgh Reflector Co. of Irwin, Pennsylvania. According to the 'Notice,' 'Calculator-Computer expects to issue five million (5,000,000) shares of stock for all the outstanding stock of Pittsburgh Reflector Co.

"You represent to me that since November 1968, the time of the Calculator-Computer transaction with Photo-Scan, neither you individually nor Allen Capital Corp. has had any rapport with the principals of Calculator-Computer. You have in no way, either individually or corporate-wise, exercised any 'control' with respect to Calculator-Computer.

"Since December 1967, when Allen Capital Corp. acquired its shares of Calculator-Computer, none of such shares have

Parmaise, Cooper & Quinn

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been sold, transferred or conveyed and the same remain intact as of the date of this letter except as hereinabove set forth and except as to 10,000 shares which Allen Capital Corp. donated to an Internal Revenue approved Foundation. By virtue of the foregoing, Allen Capital Corp. possesses 311,000 shares."

The foregoing are the facts, circumstances, events and documentation which you have presented to me, which I have carefully considered in the light of applicable law, which I shall discuss hereinafter and solely upon which the opinions contained hereinafter are based.

The character, recent history and present posture of Norman Rubinson, Allen Capital Corp. and Allen Electronic Industries, Inc. are pertinent herein for reasons shortly set forth.

The foregoing pertinent facts, which are controlling considerations as hereinafter seen, are as follows:

"Until September 1968, Allen Electronic Industries, Inc. was financially sound and rested upon a financially sound and productive past performance, as well as enjoying then currently profitable business. The Company was expanding its markets and was current in its trade debts and obligations. Allen Electronic Industries, Inc. enjoyed healthy relationships with its product suppliers.

"In September 1968, a serious business problem arose for Allen Electronic Industries, Inc., of which it was unaware until that time. Philco Finance Corp. entered a claim against Allen Electronic Industries, Inc. based upon missing inventory in the amount of $400,000. The Securities and Exchange Commission was made aware of the reported shortage in the 8-K Report filed by Allen Electronic for the month of September 1968.

"Since the report of the shortage (September 1968), for which no explanation has been given, Allen Electronic had been adversely affected business-wise and, resultantly, financial-wise. Credit sales ceased and Allen Electronic had no products to sell. Overhead continued and payments could not be made. At the end of 1968, Allen Electronic ceased doing business. Litigation has plagued Allen Electronic and the same continues to the present.

"With specific reference to the Philco Finance situation, both Rubinson personally and Allen Capital Corp. guaranteed the payment by Allen Electronic.

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"Presently, Allen Electronic Industries, Inc. is not in business except for attempting to wind up its affairs. William K. Chester, Esq., counsel to Allen Electronic Industries, Inc., has stated to the undersigned that a bankruptcy proceeding, voluntary or involuntary, may be imminent.

"Norman Rubinson has advised the undersigned that he desires to utilize a portion of the proceeds of the sale of the Calculator-Computer shares (under discussion herein), to satisfy the obligations of Allen Electronic Industries, Inc. and thereby avoid a bankruptcy proceeding. Of course, it is noted that Rubinson is the sole stockholder of Allen Capital Corp., which owns such shares and can cause such an application of proceeds. With respect to the Philco Finance situation, in fact, Allen Capital Corp. and Rubinson, individually, guaranteed Allen Electronic's obligation and ultimately, the shares may be subject to a creditor's action in satisfaction of such guaranty."

Based upon the foregoing facts and circumstances, Allen has solicited my opinion as to the propriety of selling all or part of Allen's 311,000 shares of Common Stock of Calculator-Computer without registering the same pursuant to the Securities Act of 1933, as amended, (hereinafter referred to as the "Act"). You (referring to "Allen"), inquire as to whether or not an exemption from the aforementioned registration is available in the light of the events and circumstances outlined. My opinion and the discussion contained hereinafter relevant to such opinion are based upon the facts and circumstances as set forth hereinabove and both the opinion and the discussion are limited and qualified to the extent that they are restricted to the exact facts as presented by Allen to me, except for general statements of the law contained hereinafter. Should any of the foregoing be materially altered or to any substantial degree incorrect, the following discussion and opinions may become invalid.

Initially, I should like to state that with respect to the saleability absent registration of the 311,000 shares of Calculator-Computer which Allen presently owns, I have no hesitation in unequivacably stating, that in my opinion, the facts and circumstances as set forth above, present a clear case of an "exempted transaction" within the meaning of Section 4(1) of the Act 3/. I believe that the situation presented herein is one

3/ 15 U.S.C. 77d(1)

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within the direct contemplation of such statute.

Be well aware that the terms of an exemption are strictly construed and the burden concerning the availability of an exemption and the compliance with the terms not to violate the statutory pattern bestowing such privilege is upon the claimant thereof 4/. With the foregoing in mind, let us examine the operation of Section 4(1) and apply the same to the instant facts presented herein.

Section 4(1) does not exempt "persons," but rather it exempts "transactions." This was made clear in a case referred to as the Chinese Benevolent Association case 5/. The discussion hereinafter looks to a determination as to whether or not the sale of your 311,000 shares of Calculator-Computer would be an "exempted transaction."

"Persons" as referred to in the Chinese Benevolent Association case includes "corporate entities" as well as "living, breathing, human beings." "Person" in the definition and interpretation of Section 4(1) is contrasted with "transactions." Throughout this opinion, the term "person" includes consideration of Allen as a "corporate entity" and "an artificial person created by law" which is the universally accepted definition of a "corporation." Allen is being dealt with herein as a "person" in all respects with all of the rights granted to "natural persons" under the Federal Securities Statutes.

Let us briefly examine the foregoing Section 4(1), and discuss the availability as an exemption from registration in this instant matter.

Section 4(1) 6/ exempts from registration "transactions by any persons, other than an issuer, underwriter or dealer ..."

In this situation, Allen is obviously not an "issuer." The definition of "issuer" as contained in Section 2(4) of the Act 7/ rejects any other view.

4/ S.E.C. v. Ralston Purina Co., 346 U.S. 119;
S.E.C. v. Culpepper, 270 F. 2d 241;
Gilligan Will & Co. v. S.E.C., 267 F. 2d 461

5/ S.E.C. v. Chinese Benevolent Association, 120 F. 2d 738; C.A. 2nd, 1941.

6/ Act of August 20, 1964, Sec. 12, 78 Stat. 580, redesignated the first clause of former paragraph (1) of Section 4 as individual paragraph (1).

7/ 15 U.S.C. 77b(4).

Passing over "underwriter" for an instant, is Allen a "dealer"? Section 2)12) of the Act 8/ is where the definition of "dealer" is found.

In contrast to the definition of "underwriter" which relates to a particular transaction, the definition of "dealer" in Section 2(12) of the Act does depend upon the person's (corporation's) general activities rather than his conduct in the particular offering. A dealer is "any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling or otherwise dealing or trading in securities issued by another person." 9/

There is no doubt from the foregoing definition that Allen is not a "dealer" in securities, no matter how broad a definition that designation is given.

It is, however, of prime importance in this discussion to ascertain whether or not Allen is an "underwriter" with respect to the 311,000 shares of Calculator-Computer.

The term "underwriter" is defined not with reference to the person's general business or profession, but rather on the basis of his relationship to the particular offering, in this instant matter the 311,000 shares of Calculator-Computer.

The definition of an "underwriter" as it relates to this matter turns upon one question, "as to whether or not one 'purchased from an issuer' with a view to the distribution of such security." Note, for the purpose of clarity, it is again reminded that "person" or the term "one" refers to a "corporate entity."

If Allen did purchase from an issuer with a "view to the distribution of such security," then it would be an underwriter as defined in Section 2(11) 10/ and therefore not a person "other than an issuer, underwriter or dealer" as provided for in the first clause of Section 4(1) and it follows that being excluded from Section 4(1), the exemption provided for by such Section is unavailable and Section 5, the Registration Statement, 11/ must be complied with.

8/ 15 U.S.C. 77b(12)
9/ H.R. Rep. No. 85, 73rd Congress, 1st Session (1933) 14
10/ 15 U.S.C. 77b(11)
11/ 15 U.S.C. 77e(a)

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Contrarily, if Allen did not "purchase from an issuer with a view to the distribution of such security" but rather purchased from an issuer with a view to investment, then it would not be an underwriter as defined in Section 2(11) and would be a "person" exempt by Section 4(1) and therefore have available to it the exemption from Section 5 as provided in said Section. The foregoing provided of course, that in the event of present offer or sale, all other factors are consistent with such initial intent.

The focal question is the ascertainment of Allen's original intent when it first acquired the shares of which it now wishes to be divested. This "intent" can only be determined in retrospect by comparing the facts as they existed then with the facts as they exist now and examining those circumstances which have arisen in between, which have caused Allen's situation to become altered and presently compel or necessitate action. Of course, to ascertain a corporation's intent is a nebulous concept, but certainly a scrutiny of the financial and business position of a corporation at the time it undertakes an activity and a subsequent serious reversal of its former health condition at the time it wishes to reverse its action for its financial betterment or even its continued existence, is indicative of "intent" insofar as a corporate entity may possess the same.

An early opinion of the General Counsel of the Commission made it clear that the intent at the time of the initial acquisition is essentially a question of fact and that the mere statement that a receiving of securities was for investment and not for resale is by no means conclusive. 12/ Such opinion is still a controlling proposition today.

Whether a person (or "corporation," as in this instant matter), originally took for investment and subsequently underwent a change of mind, or whether the shares were taken with a view toward a contemplated distribution determines whether or not a person is an "underwriter" with respect to a particular transaction.

The purchaser's intent to take for investment and not for resale is judged at the time of the taking in the light of the then present facts and circumstances. Subsequent facts and circumstances which intervene between the original taking and the subsequent resale

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12/ Opinion of General Counsel; Securities Act Release No. 603 December 16, 1935.

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are evidenciary facts siding in determining the initial intent. Subsequent facts which are of such import so as to alter any reasonable person's original investment intent serve to more definitely establish that original intent as one of investment. It is the subsequent facts shedding light upon the subjective intent of the person taking the securities which we are interested in during this discussion and it is the subjective intent of the taker at the time of such taking which is the determinant. As stated hereinbefore, a corporation's intent seems only to be made apparent by comparing its status at the time of acquisition with its status at the time of desired divestment.

The purchaser's own statement or written representation or acknowledgment that he "took for investment and not for resale" is judged by the subsequent happenings occurring between the initial taking and the ultimate distribution or desire to distribute. The subsequent facts must not be inconsistent with a bona fide change of intent and such facts must demonstrate a reasonable basis for the change of intent so as to establish the original intent as what it actually was.

The maintenance of the status quo in the condition of the issuer and in the condition of the one who took from such issuer would not lead to an inference that the distributor of such securities originally took them for an investment purpose. Immediate resale, likewise negates an investment intent, as does holding the securities for merely six months so as to gain the advantage of a capital gains as provided for in Internal Revenue Laws. The shorter the period before resale, the stronger the inference that there had been an intention to resell from the beginning unless the purchaser could show some plausible reason why he had changed his mind or circumstances necessitating such relatively rapid "change of intent."

In one opinion, the General Counsel of the Commission expressed the view that retention of the securities for as long as a year "would create a strong inference that they had been purchased for investment." 13/

In such opinion by the General Counsel it was stated, that in his opinion, if the securities "were retained for a period as long as a year that fact would be sufficient, if not contradicted by other

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13/ Securities Act Release No. 1F62, December 14, 1938, 11 F.R. 10962

evidence, to create a strong inference that they had been purchased for investment."

Though not binding upon the Commission, its highest legal officer gives as guidance to the public, a one-year period which would lead to an inference of an initial investment intent rather than an inference of contemplated distribution. Granted the Opinion of the General Counsel is somewhat dated but the same has never been revoked nor amended and, in fact, the time period has been adopted in certain judicial opinions dealing with this instant question. (See hereinafter.)

Release 33-1862 14/ significantly states the focal point herein, viz., "some question will undoubtedly be raised as to the meaning of the term 'purchases ... for investment.' as used in the rule (referring to Rule 142). The application of this term is of course to be ascertained in any given case by reference to the intention of the purchaser at the time of purchase. What his intention was at that time is a question of fact." 15/

I believe that your original investment intent is amply demonstrated by the intervening circumstances which have occurred, which you have stated to me as hereinbefore set forth. These circumstances lead me to my opinion that your original investment intent is apparent and permits present divesture absent registration.

I am certainly not unmindful of the fact that Allen's period of retention of the Calculator-Computer shares is comparatively short. The period does not fall below the indication of time expressed by the General Counsel in Securities Act Release No. 603, as well as a similar "rule of thumb" expressed in Release 33-1862. However, even if the period of retention were considerably shorter (less than one year), the "intent" of the exemption makes it clear that there is to be no slavish adherence to any mere "rule of thumb." It is the overall factual situation which prevails rather than opinionary guidelines which themselves are not definite.

In this instant matter, not only does the available evidence not contradict an original investment intent but rather, it contrarily demonstrates it, by showing substantial and compelling reasons for

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14/ Cited supra
15/ Parenthesis supplied

sale at this time. Your present financial distress would, in my opinion, make any further retention of your shares of Calculator-Computer unadvisable and imprudent. Moreover, failure to sell at this critical time would be a distinct dis-service to Allen Electronic shareholders. If Rubinson is sincere in that he will cause Allen to satisfy the debts of Allen Electronic Industries, Inc. out of the proceeds of the sale of the shares of Calculator-Computer, the public shareholders of the latter-mentioned corporation will undoubtedly benefit.

Again, as to the period of time for retention, let is be stated that there is no specific time period established for the retention of securities after which the holder thereof would be conclusively presumed to have taken for investment and the resale of such securities would be automatically permitted absent registration due to the fact that the seller would not be deemed to be an "underwriter." The aforementioned opinion of the Commission's General Counsel is considered herein as a guideline and not as binding in any way. The popular concept that holding shares for thirteen (13) months sets up the aforementioned conclusive presumption is erroneous and is a myth born out of mere statements of opinion as set forth above and by the fact that with respect to Regulation "A" offerings, resales of securities obtained through "private purchases" attendant thereto are restricted and/or escrowed for a period of thirteen (13) months so as not to destroy the $300,000 ceiling permitted annually in order to qualify for such an exemption. Based upon the Regulation "A" requirement of $300,000 permitted per year, issuers and investors have adopted the "13-month period" as a safety device. They merely add one month to the year requirement "in order to make sure." The "13-month period" has no applicability to the instant discussion herein with respect to the exemption provided under Section 4(1) of the Act. This is a popular misconception and leads to many misinterpretations and violative distributions.

In determining whether one's intent was originally an "investment intent" or whether it was a "distribution intent" so as to determine whether or not one is an "underwriter" in a particular transaction necessitating registration before the sale of his securities and not making available to the possessor of the

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latter intent, the exemption provided for in Section 4(1) of the Act, naturally, the time period during which the shares were held is a determining evidenciary factor, certainly to be regarded. A distribution within a relatively short time after acquisition would be evidence of an original intent to distribute. However, it is conceivable that an almost immediate distribution could take place and still be consistent with an investment intent depending upon surrounding facts and circumstances such as unforeseen financial reverses suffered by the investor necessitating immediate liquidation and other extrinsic matters of similar importance.

While, as noted heretofore, there is no specific time period stated by the Commission so as to conclusively determine the original intent as stated hereinbefore, several litigated matters have considered the question of retention with regard to the time period thereof and discussed the same. This is in addition to the above-cited opinion of the Commission's General Counsel. The Crowell Collier Case, 16/ discussed hereinafter is one of such cases.

In this particular matter, the fact of your holding intact, all of the 311,000 shares of Calculator-Computer for a period of time, standing alone, does not result in any conclusions as to your original intent. It is, however, evidence against your right to presently divest without the need for registration pursuant to the permission granted by falling within Section 4(1) of the Act. However, the other factors involved herein are of such great magnitude, that I am of the opinion that the period of retention, whatever it may be, is rendered de minimus in the overall situation.

The determining factors in my mind would be those facts and circumstances which intervened within the period during which you have held your shares so as to demonstrate that any prudent person in Allen's position, originally taking for investment purposes, would be acting wisely and reasonably in presently contemplating distribution, and in the light of such intervening facts and circumstances, his original intent of investment is made clear.

16/ In re: Crowell Collier Publishing Co., Securities Act Release No. 33-3825, August 12, 1957

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I believe that the amount and nature of the intervening circumstances between the time of the taking of the securities and the present, are completely consistent with an original intent for investment which has reasonably changed and presently requires sale. The seriousness of Allen Electronic Industries' present financial problems speaks for itself. The responsibility Allen is undertaking to the stockholders of Allen Electronic Industries, Inc. is compelling.

It is the intention at the time of the taking of the securities which is the determinant. It is the subsequently arising facts and circumstances, unforeseen at the time of the purchase, which show the basis of the change of such initial intent and demonstrate that a later distribution of the securities to the public without registration is or was warranted and permitted within the Statute. Let us now discuss your particular case and the attendant circumstances attaching thereto in the light of some definite standards set forth in litigated matters.

According to the Crowell Collier matter, some of the factors indicating that the initial purchase was with a true investment intent and not one of immediate distribution are:

(a) "Purchaser holds only long enough to take advantage of six months capital gains period of tax statute."

You have retained your shares substantially longer than the six months period.

(b) "Purchaser is a broker-dealer."

Obviously, you are in no way either a broker or a dealer.

(c) "Purchasing with the idea of holding for a deferred sale."

This standard, as well as the next, (d), suggest that the "investment shares" were taken only for the purpose of selling the same at a time when the market price thereof was appreciated in value and a sum of money could be realized in excess of that paid for such shares. This guide would appear to be "weighty" in an

evidenciary sense if no other compelling circumstances were attendant to the desire to divest. That is not so herein! The stockholder, viz. Allen, is in financial need as well as the nature and character of the investment (Calculator-Computer) changed.

As applies to the next sub-paragraph (d), you have informed me that all present indications are such that the shares you hold and presently wish to sell will appreciate higher in value upon the over-the-counter market. The current market situation and the activity of the present "control" persons directing Calculator-Computer substantiate this belief. In the latter regard, reference is made to Exhibit " " attached hereto.

(d) "Purchasing with a view of holding for a market rise and selling on market rise."

It is difficult to place a mathematical price upon that which was the purchase price of the 311,000 shares of Calculator-Computer presently held by Allen Capital Corp. inasmuch as Allen received the same as a dividend by virtue of its holdings of Allen Electronic (see hereinbefore under "Statement of Facts"). Of course, if the shares were obviously depressed in price, this and the foregoing standard (c) would have been obviously and conveniently available to Allen although the financial success of the shareholding would have been doomed. Reasonable persons or corporations certainly expect to earn a profit when they invest in anything and there is nothing immoral or illegal in doing so. The pivotal determinant in whether or not Allen may presently divest itself of its shares of Calculator-Computer is not "whether or not you lost your money." Repetitious as it may be, the main concern is "what was the original intention at the time of purchase"? This may be seen retrospectively by examining the intervening influences upon Allen with respect to financial considerations as we have been doing herein.

(e) "Holding for one year, in absence of occurrence of unanticipated events which would justify a later change of intent consistent with an initial investment intent."

You have held for longer than "one year" as set forth in the Crowell Collier case. Additionally, Allen's retention has been attended by the sort of unforeseen and unanticipated events which now

compel the action it wishes to take, viz., divestiture. Allen even wishes to sell now or rather, is forced to so do even though you state to me that you certainly believe the shares will further appreciate in value upon the stock market. Your situation is directly within the contemplation of the statutory provision providing for exemptions in such contingencies. The retention of your shares for the period during which you have held them intact, coupled with the intervening reverses financially sustained by Allen and other for whom Allen is responsible, in the light of presently existing conditions, points to a conclusion that present divestiture would be consistent with an original "investment intent." The bona fides of Allen's present desire to sell its shares is apparent by the nature of the circumstances arising since its purchase thereof and the fact that the same were unanticipated, such as an imminent business bankruptcy (Allen Electronic Industries, Inc) unless the shares are sold. I am certainly of the opinion that the extrinsic facts and circumstances in and of themselves support a distribution of Allen's stock position in Calculator-Computer absent compliance with the Registration Provisions of Section 5 of the Act. This is due to the nature of the intervening, unanticipated events which logically and prudently now require Allen to act upon its need to divest.

Be mindful of the fact that not only has the position of the purchaser (Allen Capital Corp.) materially changed, to wit, the financial situation of Allen Electronic as well as its (Allen's) personal guarantee of a monetarily large obligation, but the situation surrounding Calculator-Computer has been materially altered. As stated by Rubinson, he has "no interest whatever in common with the present principals of Calculator-Computer, has no interest with respect to the corporate activity of Calculator-Computer and moreover, is in disagreement with the present program and acquisition activity of Calculator-Computer."

The situation has so changed from all viewpoints so that the "taker's" original intent of investment can do naught but change in the exercise of reasonable prudence. In the present posture of Allen Capital Corp., Allen Electronic Industries, Inc. and Norman Rubinson, superimposed upon a lack of rapport and interest in the Company (Calculator-Computer), in which the shares are held as well as the shareholders' general disapproval of such Company's

present business and corporate activity, there can be no doubt but that present divestment is advisable. It is emphasized that all of the negative events, occurrences and happenings which presently suggest sale, occurred subsequent to the "taking" of the shares and were unforeseen at such time.

Securities Act Release No. 33-4552, 17/ codified the Commission's view with respect to the problem under discussion herein. As a matter of fact, the subject Release embodies as the Commission's view, the standards embodied in the Crowell Collier matter. 18/ This guidepost Release (33-4552), after discussing the "private offering" exemption, 19/ enters a re-discussion of the Crowell Collier standards and adopts those already espoused in such case with respect to "purchase for investment" and the status of such individual as an "underwriter."

The reasoning, statements and standards of Release No. 33-4552 is consistent with that contained herein by the undersigned and, in fact, served as a guide for the opinion rendered herein. Such law and interpretation as advanced in the said Release is currently applicable as of the date of this opinion.

Based upon the facts presented to me and as discussed hereinabove, I unqualifiedly am of the opinion that Allen may publicly offer and sell the 311,000 shares of Calculator-Computer of which it is now possessed without the benefit of Registration pursuant to Section 5 of the Act. I am of the opinion that Allen qualifies for an "exempted transaction" pursuant to Section 4(1) of the Act.

I am further of the opinion that Allen would in no way be an "underwriter" with respect to the sale of its 311,000 shares of Calculator-Computer regardless of how broad a definition such term is given.

The facts and circumstances surrounding the original taking of the shares of Calculator-Computer, the subsequent

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17/ November 6, 1962, 27 F.R. 11316

18/ Cited supra.

19/ Formerly the second clause of Section 4(1), by Act of August 20, 1964, Sec. 12, 78 Stat. 580, redesignated as individual paragraph 2 of Section 4. Release 33-4552 refers to pre-amendment nomenclature.

intervening occurrences and Allen's present position, leave no doubt, in my opinion, that the original purchase was attended by a bona fide "investment intent" which can be easily demonstrated, and the presently contemplated distribution is warranted and dictated by the seriousness of such subsequent intervening occurrences, all of which fall within the permissibility of Section 4(1) of the Act.

The foregoing discussion was centered about Section 4(1) of the Act and the "intervening unforeseen circumstances which arose subsequent to the investment and clarify such investment intent and presently permit sale."

With further reference to the problem under discussion herein and another avenue of approach arriving at the same conclusion, to wit, the propriety of the sale of the shares of Calculator-Computer absent registration pursuant to the Federal Securities Acts, let us briefly consider the following (we will assume a repetition at this point of the background facts and circumstances).

Allen Capital's main and readily fundable asset at the present is its ownership of the subject 311,000 shares of Calculator-Computer.

Under the "Statement of Facts" we have set forth how the Allen ownership of the shares occurred.

The present inquiry concerning Allen's divestment of its shares of Calculator-Computer, in the light of this second general avenue of consideration, is divided into four (4) stages for the purpose of clarity and facility of discussion. The four (4) aspects are as follows:

1. What was the nature of the transaction between Allen and Aquafilter (subsequently changed to Allen Electronic Industries, Inc.)?

The same basis and legal background also applies to the transaction between Allen Electronic Industries, Inc. and Yacht Harbor Island, Inc. (subsequently changed to Calculator-Computer Leasing Corp.).

We will discuss the two (2) hereinabove set forth transactions together and term them the "acquisition transactions."

2. What is or was the nature of the transaction by which Allen originally acquired Calculator-Computer shares?

3. What would be the nature of the distribution of Calculator-Computer shares to Allen Electronic's shareholders?

4. What is the character of the Calculator-Computer shares in the hands of Allen (or upon the liquidation of Allen, in the hands of former Allen) shareholders insofar as future trading, transferability and disposition is concerned?

A consideration of the foregoing questions presents a most perplexing problem if not the most, under securities law interpretation today. The foregoing is so because the Securities and Exchange Commission is itself in a state of flux concerning the problem and has not issued any "Releases" or "Interpretations" concerning the same; there has been no litigation concerning the problem the decision of which would serve as a guide to practitioners of securities law; and, those opinions which are "unofficially" expressed, differ with each Commission staff attorney or S.E.C. "expert" who renders the same. However, despite the foregoing, certain parallels can be drawn and certain tangent guideposts can be followed to seek an answer to this seemingly "insoluble" and "untouchable" problem.

The first consideration concerns itself with the transaction wherein Allen received its shares of Allen Electronic Industries, Inc. (formerly Aquafilter). This "acquisition" transaction, in and of itself requires no "registration compliance." 20/ Such transactions are "exempted transactions" as described in Section 4 of the Act and specifically in clause (2) thereof. 21/ They are

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20/ Referring to registration provisions of Securities Act of 1933, as amended, and specifically as contained in Section 5 thereunder

21/ 15 U.S.C. 77c(a)

commonly termed "private offerings." 22/ It has the same character as would a private purchase of the securities paid for by "cash" rather than by an exchange of assets.

As stated heretofore, the same legal theories apply to the "acquisition transaction" whereby Allen Electronic Industries, Inc. "purchased" Yacht Harbor Island, Inc. which name was subsequently changed to Calculator-Computer Leasing Corp. This "private transaction" was exempt from the registration requirements of the Act as it "did not involve a public offering." 23/

It is not the shares of Allen Electronic Industries, Inc. which Allen Capital Corp. inquires about in this instant opinion. It is the subsequent "dividend shares" of Calculator-Computer which Allen Capital Corp. received as a result of its holdings of Allen Electronic Industries, Inc. concerning which we are herein interested. Suffice it to say at this point that the transaction wherein Allen Capital Corp. received its 311,000 shares of Aquafilter (subsequently or simultaneously re-named "Allen Electronic Industries, Inc.") was in full compliance with the statutory pattern pertinent thereto. Likewise, Allen Electronic Industries, Inc. acquired its shares of Calculator-Computer in full compliance with the applicable statutes. The foregoing "acquisition transactions" are more dependant for their regularity and legality upon state, corporate law than upon securities' statutes.

"Stage 2" herein under discussion takes us to the point of concern with the Act. This consideration brings us to an orbital point of this opinion letter. We shall develop this "stage" by isolating portions of the over-all transaction and step by step come to the conclusion which as a perfect sequitor is the sum of all of its individual phases. It should be noted that "Stages 2, 3 and 4" are intertwined and a discussion of one leads into the next as all are an integral part of the whole or end result. Wherever possible, I shall attempt to delineate portions of the entire activity into their proper categories.

22/ 15 U.S.C. 77d(2). A transaction exempted because it is by "an issuer not involving a public offering." Act of August 20, 1964, Sec. 12, 78 Stat. 580, redesignated the second clause of former paragraph (1) of Section 4 as individual sub-paragraph (2).

23/ Idem.

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First, let us deal with the nature of the transaction wherein Allen received its shares of Calculator-Computer ("Stage 2"). Overall, Allen received its shares of Calculator-Computer as a dividend from Allen Electronic Industries, Inc., the latter corporation owning such shares by virtue of the "acquisition transaction" discussed hereinabove. Allen as a shareholder of Allen Electronic Industries, Inc. received its portion of the "dividend shares" (Calculator-Computer) as did the other shareholders of such distributing corporation. The distribution as a dividend of shares of Calculator-Computer by Allen Electronic Industries, Inc. to its shareholders, among which was Allen, is really the heart of "Stage 2."

Consider the following: an "underwriter" is one who "takes from an issuer with a view to distribution." 24/ A transaction by a party in such a position is not exempt from the registration provisions of the Act. At first blush, it would appear that Allen Electronic Industries, Inc. "took shares of Calculator-Computer with a view to the distribution" thereof. The foregoing may appear so, due to the relatively short period of time Allen Electronic Industries, Inc. held the shares of Calculator-Computer (even as a wholly-owned subsidiary) before it distributed the same to its shareholders as a dividend. Strictly applying the definitions of the Act, with respect to this initial transaction between Allen Electronic Industries, Inc. and Calculator-Computer (at the time of the transaction known as "Yacht Harbor Island, Inc."), it would appear that Allen Electronic Industries, Inc. is an "underwriter" 25/ and that Calculator-Computer would be an "issuer." 26/

However, the distribution in the form of a dividend, while literally a prohibited or more clearly stated, a violative activity, is countenanced by the Commission. We shall speak more of this point in our discussion with respect to the second aspect of your general inquiry. Suffice it to state at this point, that the transaction between Allen Electronic Industries, Inc. and Calculator-Computer is exempt from the registration provisions of the Act 27/ by virtue of Section 4(2) of the same Act. 28/ This is but a repetition of that said hereinabove. However, we are now considering with respect to our former

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24/ 15 U.S.C. 77b(11)
25/ 15 U.S.C. 77b(11)
26/ 15 U.S.C. 77b(4)
27/ 15 U.S.C. 77c(a)
28/ 15 U.S.C. 77d(2)

("stage 1") discussion, designations under the Act and certain prohibited activity pursuant to such Act should the parties to a subject transaction fall within the category or nomenclature against whom prohibitions are aimed and for whom no exemptions are applicable.

The further and more extensive consideration of Allen Electronics Industries, Inc. as an "underwriter" with respect to the Calculator-Computer transaction plunges us directly into the heart of "Stage 2."

We will now focus directly upon the distribution of Calculator-Computer shares to the shareholders of Allen Electronic Industries, Inc.

This "dividend distribution" raises numerous definitions for our consideration and concentrates upon Section 4(1) of the Act, 29/

> "transactions by a person other than an issuer, underwriter or dealer."

Allen Electronic Industries, Inc. is not an "issuer" 30/ nor is it a "dealer" 31/ as defined and interpreted under the Act. Under the broadest interpretations such aforementioned designations are given, they would not attach to Allen with respect to the subject considerations.

The statute defines "underwriter" as:

> "The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of such undertaking; . . .
>
> "As used in this paragraph, the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

29/ 15 U.S.C. 77d(1)
30/ 15 U.S.C. 77b(4)
31/ 15 U.S.C. 77b(12)

There is no doubt but that Allen Electronic Industries, Inc. would be a "statutory underwriter" pursuant to the above definition albeit "no sale" is taking (or took) place between it and its shareholders. Hereinafter, we will discuss briefly the "no sale" theory in clarification of the foregoing point. Allen Electronic Industries, Inc. did indeed "take (purchase) from an issuer (Calculator-Computer, then Yacht Harbor Island, Inc.) with a view to eventual sale of distribution" as opposed to possessing an "investment intent" which would characterize this portion of the entire transaction as a "private offering" and thereby exempt the same pursuant to Section 4(2) of the Act. 32/

An "underwriter" is defined not with reference to the particular person's general business but on the basis of his relationship to the particular offering. This is different from "dealer" where the individual's usual occupation is considered. Allen Electronic Industries, Inc. can be and is in fact, an "underwriter" in the strict statutory interpretation thereof.

While it is clear that Allen Electronic Industries, Inc. had taken from an "issuer" (Calculator-Computer) with a view to distribution, "no sale" had taken place in the dividend delcaration and distribution as "no value" had been paid in consideration thereof.

Of course, "sale" or not, as we have seen, Allen Electronic Industries, Inc. is an "underwriter" inasmuch as it has "taken from an issuer with a view to distribution." However, in the case of the declaration of a dividend or a "spin-off," the latter term aptly descriptive of the subject activity under discussion herein, the Commission has not acted to enjoin or impose penalties in connection therewith and in fact, despite the clear, literal statutory pattern prohibiting the same, the Commission countenances such corporate machination and advises the non-violative conduct with respect to the Act insofar as the same is accomplished in the absence of mala fides. This latter statement dealt with at length hereinafter, is the key to our discussion herein.

A "sale" or "offer to sell" is "every attempt or completed transaction where there is a disposition of a security for value." 33/

32/ 15 U.S.C. 77d(2)
33/ Section 2(3), 15 U.S.C. 77b(3)

There would be "no sale" between Allen Electronic Industries, Inc. and its shareholders with respect to the distribution of the Calculator-Computer shares as a dividend inasmuch as the element of "value" is missing. 34/ Additional elements would serve to take the subject transaction from without the definition of "sale" but the same are not germane herein and a full discussion thereupon would only serve to needlessly encumber this opinion.

The reason why I have dwelt upon "sale" is because it leads us to certain tangent guideposts and is a logical sequitor to a discussion of the "no sale" theory. Such "theory or well-grounded "proposition" is found in an examination of Rule 133 35/ and the landmark securities' decisions thereunder, some of which in part, or at least in reasoning, are pertinent herein.

In brief, Rule 133 provides that for purposes of registration (Section 5 compliance), "no sale" is deemed to be involved where pursuant to applicable statutory or charter provisions, the vate of a specified majority of stockholders on a proposed relcassification of securities or merger or consolidation, or a proposed sale of assets in exchange for stock of another corporation, will bind all stockholders except for the appraisal rights of dissenting stockholders. Thus, there is "no sale" involved in the issuance of shares of the surviving company to the security holders of the merged entity. The foregoing is not directly in point herein. We do not have a "Rule 133" situation herein. However, an examination of certain landmark "Rule 133" cases presents us with relevant reasoning which does pertain to our subject consideration.

The Micro-Moisture Controls case 36/ found Micro, a Delaware corporation and two of its Canadian subsidiaries issuing some 2,000,000 shares of stock to all (31) of the stockholders of Converters Acceptance Corporation, a Canadian corporation, in exchange for Converter's assets. Micro and Converters relied upon Rule 133 for

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34/ Securities Act Releast No. 33-929, July 29, 1936; Letter of General Counsel of Commission discussing whether "a sale of a security is involved in the payment of a dividend."

35/ 17 C.F.R. 230.133.

36/ S.E.C. v. Micro-Moisture Controls, Inc.

the "non-restricability" of Micro shares in the hands of Converters' stockholders. However, 26 of the 31 Converters' stockholders gave to an individual ('H") irrevocable powers of attorney to sell their shares. The H group owned of record approximately 43% of Micro and was in a "control" person with respect to Micro. H. sold more than 700,000 of the 2,000,000 shares of Micro to various brokers and dealers. The court inferred from the factual situation that all of the defendants in the case brought by the Commission, vy., Micro, several of its officers and directors, H, L, and the various broker-dealer firms "were acting together and in concert for a common purpose," so that they were all "within the group of persons in control of the issuer," Micro. The Second Circuit Court of Appeals found that "the exchange of Converters assets for Micro stock was but a step in the major activity of selling the stock." 37/ (Underlining supplied.)

There was no indication that Rule 133 ("no sale") had not excused registration in connection with Micro's issuance of stock to Converters for its assets. It was the subsequent sale of stock by a controlling block of Micro stockholders (former Converters stockholders) through underwriters which violated Section 5. This is the point briefly referred to hereinbefore with respect to "male fides." Good faith on the part of the controlling parties is essential throughout the entire hybrid transaction under discussion herein.

Subsequent to the Micro case, in consolidated proceedings, the Commission delisted two (2) Canadian oil stock from the American Stock Exchange 38/ because the issuers had falsely reported under the requirements of the Securities Exchange Act of 1934, 39/ that Rule 133 had been available for certain distributions. In these cases, there was no underwritten secondary distribution by a controlling group consisting of the former stockholders of the first corporation who had received

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37/ 148 F. Supp. 555 (preliminary injunction);
167 F. Supp. 716 (final injunction).
S.E.C. v. Culpepper, 270 F.2d 241, quoting from S.E.C. v. Micro-Moisture Controls, Inc., 148 F. Supp. 558.

38/ Great Sweet Grass Oils, Ltd., 37 S.E.C. 683; affirmed, Great Sweet Grass Oils, Ltd. v. S.E.C., 256 F.2d 893; Kroy Oils, Ltd. v. 37 S.E.C. 683; Kroy Oils, Ltd. v. S.E.C., D.C. Cir. No. 13,920, Dec. 10, 1958.

39/ 15 U.S.C. 78a, et seq.

stock of the second corporation as in the Micro case. The Commission did find that there had been a "pre-existing plan ... to use stockholders merely as a conduit for distributing a substantial amount of securities to the public. 40/

"Good faith" or the lack thereof, was again the determining factor.

One might cite a relevant portion of the Sweet Grass Rule as it may apply to this discussion as follows:

> "If the issuer (Calculator-Computer) or persons acting on its behalf (Allen Electronic Industries, Inc.) participate in arrangements for a distribution to the public of any of the stock issued to stockholders or have knowledge of a plan of distribution by, or concerted action on the part of, such stockholders to effect a public distribution in connection with the transaction, a Section 4(1) exemption would not be available since an underwriting within the meaning of the statute would be involved." 41/

In view of the foregoing and of the expressed opinion of the Commission, the entire transaction, including all of the intermediate steps, may not be a pre-existing plan or device to avoid registration and to, absent such protective device, distribute large blocks of stock to the general public.

I am aware, as stated hereinabove under "Statement of Facts," that Norman Rubinson, sole stockholder of Allen was also the "controlling party" and chief executive officer of Allen Electronic Industries, Inc. Norman Rubinson negotiated the Allen purchase of shares (in a "control" amount) of Aquafilter from the former owners thereof. Rubinson also negotiated the purchase by Allen Electronic Industries, Inc. of Yacht Harbor Island, Inc., which subsequently was renamed "Calculator-Computer Leasing Corp." Moreover, Rubinson was a "control" party when Allen Electronic Industries, Inc. "spun-off"

40/ 37 S.E.C. 690

41/ Securities Exchange Act Release No. 5483, April 8, 1957, statement taken from Commission's Findings and Opinion, pages 10 and 11 (parenthesis added for purposes herein).

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Calculator-Computer to its shareholders by means of a liquidating dividend of such asset. Finally, Rubinson by virtue of his position in Allen which held "control" shares of Calculator-Computer negotiated the sale of Calculator-Computer "control" to the "Photo-Scan group." There ends Rubinson's participation. The further activities of Calculator-Computer depended and presently depend upon the "Photo-Scan group" and its successors.

I am of the opinion that the "activities in concert" considered hereinabove, the same which would characterize a series of transactions or any one of them as a "scheme, device or plan" so as to evade statutory protections with respect to the offering of securities are not attendant to the Rubinson dominated transactions discussed hereinbefore.

The distribution of portfolio securities by way of a liquidating dividend, whether partial or total, is clearly in the same category as the ordinary stock dividend, viz., not a "sale" so as to constitute the distributor thereof an "issuer" or "underwriter" as such are defined under the Act. 42/

In fact, there may not even be a "distribution" at all (which also refers back to definition of "underwriter"). "Distribution" is a term which the Commission regards as more or less synonymous with "public offering." 43/ It is questionable whether or not such is attendant to the instant situation under discussion.

Summarizing and applying the "no sale" theory to Allen Electronic Industries, Inc. --Calculator-Computer, the "no sale" theory applies to the delivery of the new securities (Calculator-Computer) to the shareholders of Allen Electronic Industries, Inc. There is a "sale" as originally between corporations, viz., Calculator-Computer to Allen Electronic Industries, Inc., but such "sale" is an exempt transaction under Section 4(2) of the Act as "a transaction by an issuer not involving any public offering." 44/

42/ Securities Regulation, Louis Loss, Second Ed., Vol. 1, P. 518; ibid, citing authorities in footnote 185.

43/ Securities Regulation, Louis Loss, Second Edition, Vol. 1, P. 551; ibid, footnote 307 for citations in support.

44/ Following similar reasoning in Letter to Commerce Clearing House from Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, February 10, 1948.

So much for "stages 1, 2 and 3" of our consideration herein.

As a final consideration, let us turn to the status of the Calculator-Computer shares in the hands of the shareholders of Allen Electronic Industries, Inc., among such latter group being Allen and concerning such "Allen shares" this opinion letter has been solicited. Here again, the Commission is of mixed opinion and there are no directives nor precedents flowing from litigated matters (judicial or administrative) which serve to assist us.

We are concerned hereat also with a consideration of "secondary distributions."

A "secondary distribution" generally refers to the diposition of a block of stock by any person other than the issuer (Calculator-Computer). Since, as we have seen Section 2(11) of the Act includes within the term "issuer," any person directly or indirectly controlling or controlled by the issuer, a secondary distribution or redistribution of a security by a shareholder in a control relationship with the issuer is usually subject to the registration requirement of the Act.

The foregoing, as with other premises throughout our discussion is interrelated to all of the other particular considerations under advisement. However, herein we have the situation that after the distribution of Calculator-Computer shares to its stockholders by Allen Electronic Industries, Inc. (dividend was on a "share-for-share" basis), the persons who "controlled" Allen Electronic Industries, Inc., thereby "controlled" Calculator-Computer, both necessarily by the same percentages. What is the status of the Calculator-Computer shares in the hands of Allen Electronic Industries, Inc. shareholders? Are the shares of Calculator-Computer in the hands of "non-control" shareholders of Allen Electronic Industries, Inc. free? What about such dividend shares in the hands of "control" persons of Allen Electronic Industries, Inc.?

In the case of a stock dividend by A Company to A shareholders, all of the dividend stock is "freely tradeable" even in the possession of persons who are in a "control" relationship with A Company. The rationale appears to be that a "stock dividend" is in lieu of cash and inasmuch as the cash would be expendable and alienable, therefore, the "stock dividend" is of the same character. However, with respect to

A Company distributing to its (A's) shareholders as a dividend, shares of B Company, as in our instant situation, the Commission is of divergent opinions. Some hold that all of the shares are "free" (can be traded on a public market if there is such a facility established for the shares), while others assert the opinion that such shares (B Company stock), would take on the quality of "investment" stock or "control" stock in the hands of A Company individuals who stand in such a relationship as regards A Company. The latter opinion is based upon the belief that the new holdings are derived on account of a capital interest in the nature of a partial liquidation. However, as stated hereinbefore, the contrary opinion is held and is apparently irreconcilible. There is no official (S.E.C.) position taken.

It would appear that a sale by A Company individuals, who by virtue of their holdings in A Company and with respect to the arithmetic of the dividend of B shares acquired "control" of B Company, would be violative of the statutory pattern. In the case of a liquidation as a dividend of a wholly-owned subsidiary, the "control" persons of the parent company would always gain a proportionate position with respect to the "spun-off" subsidiary.

I would preliminarily conclude as follows: the "acquisition transaction" discussed hereinbefore, viz., Allen-Allen Electronic Industries, Inc. initially, and, then Allen Electronic Industries, Inc. with Calculator-Computer, were exempted transactions pursuant to Section 4(2) of the Act; the distribution of Calculator-Computer shares by Allen Electronic Industries, Inc. to its shareholders as a dividend is an exempted transaction in accordance with the Commission's view thereupon and by virtue of the "no sale" theory; the shares of Calculator-Computer in the hands of "non-control" shareholders of Allen Electronic Industries, Inc. are "free trading" in the absence of a plan or scheme to utilize such shareholders as a conduit for distribution in evasion of the registration requirements of the Act; the Calculator-Computer shares in the hands of "control" persons of Allen Electronic Industries, Inc. who by virtue of the dividend stand in an exact position with respect to Calculator-Computer, may or may not be "free" depending upon future Commission consideration and determination thereof. However, coupling the above discussion, at least the results and conclusions drawn from the consideration given to the first three (3) "stages" with the facts, circumstances and conclusion reached with respect to the first major consideration herein, at least in this subject matter, I would unhesitatingly proffer the opinion that the shares (311,000)

of Calculator-Computer in the hands of at least one (1) "control" person of Allen Electronic Industries, Inc., viz., Allen Capital Corp. are "freely tradeable." The foregoing is so due to initial consideration hereinbefore which is recalled at this point as being a series of events and circumstances arising subsequent to Allen's acquisition of its shares in both Allen Electronic Industries, Inc. and Calculator-Computer, which said facts and circumstances at this point certainly, reasonably suggest, if not dictate, present divestiture.

Respectfully submitted,

GERMAISE, COOPER & QUINN

By Irwin L. Germaise
Irwin L. Germaise

LAW OFFICES
IRWIN L. GERMAISE

(212) 755-8252

59 EAST 54TH STREET
NEW YORK, N. Y. 10022

2101a Rubinson Documents -- Letter Dated August 28, 1968 from Irwin L. Germaise to Board of Directors, Calculator--Computer Leasing Corp.

August 28, 1968

Board of Directors
Calculator - Computer Leasing Corp.
2301 North Miami Avenue
Miami, Florida

Gentlemen:

With respect to the status, transferability and registration requirements pertaining to a proposed series of transactions as set forth hereinafter, the following discussion and opinions are presented in the light of the Securities Act of 1933, as amended (hereinafter referred to as the "Act")[1/] the Rules and Regulations promulgated thereunder[2/] and the applicable judicial and administrative decisions and interpretations relative thereto.

The material facts and circumstances which you have related to me, hereinafter under discussion and solely upon which I will render an opinion are as follows:

"Calculator - Computer Leasing Corp., (hereinafter referred to as "Calculator"), a public corporation with approximately 2000 shareholders of record is contemplating the purchase of 200,000 shares of the Common Stock (20%) of General Auto Parts, Inc. (hereinafter referred to as "General") out of funds legally available therefor. General will be the name of the "issuing corporation" after it has completed a non-relevant transaction in its own behalf whereby it acquires a "third company" and integrates it into its operation (prior to the sale to Calculator).

"Calculator and General are both located in Miami, Florida.

1/ 15 U.S.C. 77a, et seq.
2/ 17 C.F.R. 230.100 et seq.

"General, with 1,000,000 shares of Common Stock authorized is privately (as opposed to "publicly") owned.

"General, with apparent great potential, as you have reported to me, is however, "cash poor" and while it is expanding at the present (new stores), it is in need of cash resources to fulfil its proposed programs and to realize its potential.

"Calculator intends to purchase the aforementioned 20% of General's Common Stock for a price in ratio to the net worth of such selling company (20% the net worth).

"The money realized as a result of the stock sale and purchase, will be used by General for its corporate purposes. The shares are not being sold by General stockholders for their own account.

"There is presently no relationship between Calculator and General, including but not limited to: no interlocking directorates, no "control" shareholders in common, no present common or joint interests, etc.

"The prospective transaction is merely on the part of the Calculator directors, a good opportunity for Calculator stockholders to diversify their holdings and to possess shares in a Corporation which such directors believe will appreciate in value as a result of present activity on behalf of General and further as enhanced and aided by the capital it will realize as a result of the Calculator purchase."

The direct subject of your inquiry concerns the following aspects as such are viewed under applicable federal securities regulation:

1. What is the nature of the transaction between Calculator and General?

2. What is the nature of the distribution of General shares to Calculator stockholders?

3. What is the character of the General shares in the hands of Calculator stockholders in so far as future trading and disposition is concerned?

Initially, I will state that you have posed perhaps one of the most perplexing problems in securities' law interpretations today. The foregoing is true because: the Commission is itself in a state of flux concerning the matter, there has been no litigation concerning the problem, the decision of which would serve as a guide to practitioners of securities' law, there have been no Commission Releases or Interpretations directly concerning the problem, and, most confusing of all, opinions which are expressed, differ with each Commission attorney and seasoned S. E. C. practitioner that renders the same. However, despite the foregoing, let us discuss problems in the light of tangent guideposts and at least clarify our thinking concerning this apparently "untouchable" and "insoluble" problem.

The first consideration concerns itself with the transaction between Calculator and General, viz., the purchase and sale of 20% of the authorized common stock of General to Calculator. This transaction in and of itself requires no registration compliance. It is a "private" transaction, exempt by operation of Section 4(2) of the Act[3/] and directly within the purview thereof.

Of course, as defined under the Act, Calculator would seem to be an "underwriter" and it would take from "issuer" General with "a view to distribution". However, the distribution in the form of a dividend, while literally a prohibited or more clearly stated, a violative activity, is countenanced by the Commission. We shall speak more of the latter distinctions in the discussion concerning the second aspect of your inquiry hereinafter and Section 4(2) of the Act. At this point, it is suffice to state that the transaction between Calculator and General is exempt from the registration provisions of Section 5 of the Act.[4/] by virtue of Section 4(2) of the same Act.

3/ 15 U.S.C. 77d(2)
"A transaction exempted because it is by "an issuer not involving a public offering". This is commonly referred to as "a private offering". Act of August 20, 1964, Sec. 12, 78 Stat. 580, redesignated the second clause of former paragraph (1) of Section 4 as individual paragraph (2).

4/ 15 U.S.C. 77e(a).

While it is most difficult to segregate and bracket each part of the entire subject transaction and tie a section of the act label upon it, we shall attempt to do so, so at least to chamber our thinking and to obtain a clear picture of the problems presented. It is however stated, that this transaction is unique and non sui generis in that it really presents a series of transactions, interrelated and as yet undefined and uninterpreted by the suppose font of such information, viz., the Commission.

Let us now consider a second aspect of the series of steps, such being the distribution of the General shares to Calculator stockholders by purchaser Calculator.

This limited transaction would invoke numerous definitions under the Act and the Rules and brings up an initial consideration of Section 4(1) of the Act. 5/

> "transactions by any person other than an issuer, underwriter or dealer."

Calculator is not an "issuer" 6/ nor is it a "dealer" 7/ under the broadest interpretations of such terms, as they are defined in the Act.

As briefly mentioned hereinbefore, our concern is with Calculator as an "underwriter" as such is defined in Section 2(11) of the Act. 8/

The statute defines "underwriter" as:

> "The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with,

5/ 15 U.S.C. 77d(1)
6/ Section 2(4), 15 U.S.C. 77b(4)
7/ Section 2(12), 15 U.S.C. 77b(12)
8/ 15 U.S.C. 77b(11)

> the distribution of any security or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the director or indirect underwriting of such undertaking; . . . . . As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

There is no doubt but that Computer would be a "statutory underwriter" pursuant to the above definition albeit "no sale" is taking place between it and its present shareholders. Hereinafter, we will discuss briefly the "no sale theory" in clarification of this point. Computer is "taking from an issuer (General) with a view to distribution" as opposed to possessing an "investment intent" and characterizing this portion of the entire transaction as a "private offering" and thereby exempting the same pursuant to Section 4(2) of the Act. 9/

An "underwriter" is defined not with reference to the particular person's general business but on the basis of his relationship to the particular offering. This is different from "dealer" where the individual's usual occupation is considered. Calculator can be and is in fact, an "underwriter" in the strict statutory interpretation thereof.

While it is clear that Calculator has taken from an "issuer" (General), with a view to distribution, "no sale" has taken place in the dividend declaration as "no value" has been paid in return therefor.

Of course, "sale" or not, as we have seen, Calculator is an "underwriter" inasmuch as it has "taken from an issuer with a view to distribution". However, in the case of the declaration of a dividend or a "spin off", the latter term aptly descriptive of the subject activity under discussion herein, the Commission has not acted to enjoin or impose penalties in connection therewith and in fact, despite the clear, literal statutory pattern prohibiting the same, the Commission countenances such a corporate machination and advises the non-violative conduct with

9/ 15 U.S. C. 77d(2)

respect to the Act insofar as the same is accomplished in the absence of mala fides. This latter statement, dealt with at length hereinafter, is the key to our discussion herein.

A "sale" or "offer to sell" is "every attempt or completed transaction where there is a disposition of a security for value".[10/]

There would be "no sale" between Calculator and its shareholders with respect to the distribution of the General shares as a dividend inasmuch as the element of "value" is missing.[11/] Additional elements would serve to take the subject transaction from without the definition of "sale" but the same are not germane herein and a full discussion thereupon would only serve to needlessly encumber this opinion.

The reason why I have dwelt upon "sale" is because it bridges us to certain tangent guideposts and is a sequitor to a discussion of the "no sale" theory. Such theory or well grounded proposition is found in an examination of Rule 133 [12/] and the landmark securities' decisions thereunder, some of which in part, or at least in reasoning, are pertinent herein.

In brief, Rule 133 provides that for purposes of registration (Section 5 compliance), "no sale" is deemed to be involved where pursuant to applicable statutory or charter provisions, the vote of a specified majority of stockholders on a proposed reclassification of securities or merger or consolidation, or a proposed sale of assets in exchange for stock of another corporation, will bind all stockholders except for the appraisal rights of dissenting stockholders. Thus, there is "no sale" involved in the issuance of shares of the surviving company to the security holders of the merged entity.

10/ Section 2(3), 15 U.S.C. 77b(3).

11/ Securities Act Release No. 33-929, July 29, 1936; Letter of General Counsel of Commission discussing whether "a sale of a security is involved in the payment of a dividend.

12/ 17 C.F.R. 230.133

The Micro-Moisture Controls case[13/] found Micro, a Delaware corporation and two of its Canadian subsidiaries issuing some 2 million shares of stock to all (31) of the stockholders of Converters Acceptance Corporation, a Canadian corporation, in exhcnage for Converter's assets. Micro and Converters relied upon Rule 133 for the "non-restrictability" of Micro shares in the hands of Converters' stockholders. However, 26 of the 31 Converters' stockholders gave to an individual ("H") irrevocable powers of attorney to sell their shares. The H group owned of record approximately 43% of Micro and was in a "control" relationship with one "L", who was a "control" person with respect to Micro. H sold more than 700,000 of the 2 million shares of Micro to various brokers and dealers. The Court inferred from the factual situation that all of the defendants in the case brought by the Commission, viz., Micro, several of its officers and directors, H, L, and the various broker-dealer firms "were acting together and in concert for a common purpose", so that they were all "within the group of persons in control of the issuer", Micro. The Second Circuit Court of Appeals found that "the exchange" of Converters assets for Micro stock was but a step in the major activity of selling the stock". [14/] (underlining supplied).

There was no indication that Rule 133 ("no sale") had not excused registration in connection with Micro's issuance of stock to Converters for its assets. It was the subsequent sale of stock by a controlling block of Micro stockholders (former Converters stockholders) through underwriters which violated Section 5. This is the point briefly referred to hereinbefore with respect to "mala fides". Good faith on the part of the controlling parties is essential throughout the entire hybrid transaction under discussion herein.

Subsequent to the Micro case, in consolidated proceedings, the Commission delisted two (2) Canadian oil stocks from the American

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13/ S.E.C. v. Micro-Moisture Controls, Inc., 148 F. Supp. 555 (preliminary injunction); 167 F. Supp. 716 (final injunction).

14/ S.E.C. v. Culpepper, 270 F. 2d 241, quoting from S.E.C. v. Micro-Moisture Controls, Inc., 148 F. Supp. 558.

Stock Exchange [15] because the issuers had falsely reported under the requirements of the Securities Exchange Act of 1934 [16], that Rule 133 had been available for certain distributions. In these cases, there was no underwritten secondary distribution by a controlling group consisting of the former stockholders of the first corporation who had received stock of the second corporation as in the Micro case. The Commission did find that there had been "a pre-existing plan . . . . . to use stockholders merely as a conduit for distributing a substantial amount of securities to the public. [17]

"Good faith" or the lack thereof, was again the determining factor.

One might cite a relevant portion of the Sweet Grass Rule as it may apply to this discussion as follows:

> "If the issuer (General) or persons acting on its behalf (Calculator) participate in arrangements for a distribution to the public of any of the stock issued to stockholders or have knowledge of a plan of distribution by, or concerted action on the part of, such stockholders to effect a public distribution in connection with the transaction, a section 4(1) exemption would not be available since an underwriting within the meaning of the statute would be involved." [18]

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15 / Great Sweet Grass Oils, Ltd., 37 S.E.C. 683; affirmed, Great Sweet Grass Oils, Ltd. v. S.E.C., 256 F. 2d 893; Kroy Oils, Ltd., 37 S.E.C. 683; Kroy Oils, Ltd. v. S.E.C., D.C. Cir. No. 13,920, Dec. 10, 1958

16 / 15 U.S.C. 78a, et seq.

17 / 37 S.E.C. 690

18 / Securities Exchange Act Release No. 5483, April 8, 1597, statement taken from Commission's Findings and Opinion, pages 10 and 11 (parenthesis added for purposes herein).

In view of the foregoing and of the expressed opinion of the Commission, the entire transaction, including all of the intermediate steps may not be a pre-existing plan or device to avoid registration and to, absent such protective device, distribute large blocks of stock to the general public.

You have assured me that the entire transaction is one at "arms-length" and as stated under the factual statement hereinabove, there are no, nor have there ever been, any activities in concert between Calculator and General of any type whatever and specifically with respect to securities and their distribution. Consideration of Calculator and General includes of course, the officers, directors and principal stockholders thereof.

The distribution of portfolio securities by way of a liquidating dividend, whether partial or total, is clearly in the same category as the ordinary stock dividend, viz., not a "sale" so as to constitute the distributor thereof an "issuer" or "underwriter" as such are defined under the Act. 19/

In fact, there may not even be a "distribution" at all (which also relates back to definition of "underwriter"). "Distribution" is a term which the Commission regards as more or less synonymous with "public offering. 20/ It is questionable whether or not such is attendant to the instant situation.

19/ Securities Regulation, Louis Loss, Second Ed., Vol.1, p. 518, ibid, citing authorities in footnote 185.

20/ Securities Regulation, Louis Loss, Second Ed., Vol. 1, p. 551; ibid, footnote 307 for citations in support.

Summarizing and applying the "no sale" theory to Calculator - General, the "no sale" theory applies to the delivery of the new securities (General) to Calculator shareholders. There is a "sale" as between corporations (General to Calculator) but such "sale" is an exempt transaction under Section 4(2) of the Act as "a transaction by an issuer not involving any public offering." 21/

So much for the first two aspects of our consideration of the entire problem presented herein.

As a final consideration, let us turn to the status of the General shares in the possession of the Calculator stockholders. Here again, the Commission is of mixed opinion and there are no directives flowing from litigated matters (judicial or administrative) which serve to assist us.

We are concerned hereat also with a consideration of "secondary distributions".

A "secondary distribution" generally refers to the disposition of a block of stock by any person other than the issuer (General). Since, as we have seen Section 2(11) of the Act includes within the term "issuer" any person directly or indirectly controlling or controlled by the issuer, a secondary distribution or redistribution of a security by a shareholder in a control relationship with the issuer is subject to the registration requirement of the Act.

The foregoing, as with other premises throughout our discussion is interrelated to all of the other particular considerations under advisement. However, while the present "control" stockholders of Calculator will not have any "control" interest in General, still there remains a question of whether or not the General shares in the hands of Calculator "control" persons are freely tradeable.

21/ Following similar reasoning in Letter to Commerce Clearing House from Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, February 10, 1948.

In the case of a stock dividend by A Company to A shareholders, all of the dividend stock is "freely tradeable" even in the possession of persons who are in a "control" relationship with A Company. The rationale appears to be that a "stock dividend" is in lieu of cash and inasmuch as the cash would be expendable and alienable, therefore the "stock dividend" is of the same character. However, with respect to A Company distributing to its (A's) shareholders as a dividend, shares of B Company, as in our instant situation, the Commission is of divergent opinions. Some hold that all of the shares are "free" (can be traded on a public market if there is such a facility established for the shares) while others assert the opinion that such shares (B Company stock) would take on the quality of "investment" stock or "control" stock in the hands of A Company individuals who stand in such a relationship as regards A Company. The latter opinion is based upon the belief that the new holdings are derived on account of a capital interest in the nature of a partial liquidation. However, as stated hereinbefore, the contrary opinion is held and is apparently irreconciliable. There is no official (S.E.C.) position taken.

There is no doubt but that a sale by A Company individuals who by virtue of their holdings in A Company and with respect to the arithmetic of the purchase and dividend of B shares acquire "control" of B Company, would be violative of the statutory pattern. But what if the "control" individuals of A Company do not possess "control" shares of B Company, are their B shares "investment stock" or "restricted shares"? Apparently, there is no answer at present of the type which may be relief upon as a binding precedent for future action.

Conclusion: It is the opinion of the undersigned, that the transaction whereby Calculator purchases shares of General is exempt pursuant to Section 4(2) of the Act; the distribution of the General shares as a dividend to Calculator shareholders is an exempt transaction in accordance with the Commission view thereon and the "no sale" theory; the General shares in the hands of the "non-control" Calculator shareholders are "free trading" in the absence of a plan or scheme to utilize such shareholders as a conduit for distribution in evasion of the Registration requirements of the Act; the General shares in the possession of Calculator "control" persons may or may not be "free" and such depends

upon the future determination of the Commission, which presently expresses no definitive opinion thereon and unofficially expresses opinions with respect thereto as varied as the person rendering the same.

In the event that the General shares in the possession of Calculator "control" stockholders are not "free", methods for the divesture thereof are the subject of additional discussions and opinions.

Respectfully submitted,

Irwin L. Germaise

Irwin L. Germaise

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2113a Rubinson Documents -- Letter dated July 18, 1968 from Skadden Arps to Dr. Sidney Estridge

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
551 FIFTH AVENUE
NEW YORK 10017
212 OXford 7-[illegible]

LESLIE H. ARPS
WILLIAM H. MEAGHER
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MAURICE R. ROCHE, JR.
BARRY H. GARFINKEL

LEON C. BAKER
EDWIN ROBBINS
COUNSEL

CABLE ADDRESS
"SKARSLAW NEWYORK"

July 18, 1968

Mr. Sidney Estridge
Reynolds Fasteners, Inc.
300 Forest Drive
Greenvale, Long Island, New York

Dear Sidney:

You have requested our advice on the question of whether you may sell stock of Calculator-Computer Leasing Corp. received by you as a stock dividend on stock of Allen Electronic Industries, Inc. owned by you. We understand the facts to be as follows:

You recently acquired shares of stock of Allen Electronic Industries, Inc. under an investment letter in a transaction whereby you sold certain assets to that corporation. At the time you became a stockholder of Allen Electronic Industries, Inc. you had no knowledge of the contemplated stock dividend and your stock interest in Allen Electronic Industries, Inc. is not such as to make you a control stockholder of that corporation or a member of a group of controlling stockholders. As to this latter point, you realize that the determination of control is a question of fact and that we are relying solely on your assurances in this regard.

Shortly after you became a stockholder of Allen Electronic Industries, Inc. you were advised that that corporation proposed to declare a stock dividend of 100% of the Common Stock of Calculator-Computer Leasing Corp. which it owns, on a share-for-share basis, to its stockholders of record at the close of business on June 22, 1968.

Skadden Arps to Dr. Sidney Estridge

It was our preliminary view that the shares of Calculator-Computer Leasing Corp. received by you as a dividend would not be subject to the restrictions in the investment letter applicable to your stock ownership of Allen Electronic Industries, Inc. However, we were unable to find any definite authority on this point and have therefore raised the question with a member of the staff of the Securities and Exchange Commission in Washington. We were advised by such person that it would be the view of the staff that the stock of Calculator-Computer Leasing Corp. under the circumstances set forth above would not be subject to the restrictions of the investment letter and would therefore be freely transferable by you so long as you are not a controlling person of either Allen Electronic Industries, Inc. or Calculator-Computer Leasing Corp.

Sincerely yours,

Peter P. Muller

CALCULATOR-COMPUTER LEASING CORP.
2301 North Miami Avenue
Miami, Florida 33127

October 1, 1968

NOTICE OF DECLARATION OF STOCK DIVIDEND

To the Stockholders:

Recently, your Company, for the purchase price of $23,777.65, by Agreement dated the 12th day of September, 1968, purchased 216,700 shares of the Common Stock of GENERAL AUTO PARTS STORES, INC. This represented a purchase of 20% of the issued and outstanding stock of that Company.

The Board of Directors of your company have concluded that it would be beneficial to the Stockholders to declare a 100% stock dividend of the stock that the Company owns in GENERAL AUTO PARTS STORES, INC. It was, therefore,

"VOTED AND RESOLVED:

That as of October 1, 1968, a Stock Dividend is hereby declared of 100% of the Stock owned by Calculator-Computer Leasing Corp. in GENERAL AUTO PARTS STORES, INC. for every five (5) shares of stock owned in Calculator-Computer Leasing Corp., the stockholders shall receive a dividend of one (1) share of GENERAL AUTO PARTS STORES, INC. This dividend stock shall be payable to the stockholders of record of Calculator-Computer Leasing Corp. as of the close of business on October 25, 1968, and forwarded to the stockholders on November 1, 1968."

The GENERAL AUTO PARTS STORES, INC. stock has never been publicly traded, and there is no known present market for its stock.

Since the time of the purchase of the 216,700 shares of stock by the corporation in GENERAL AUTO PARTS STORES, INC., it has carried this stock asset on its accounting records for $23,777.65. Calculator-Computer Leasing Corp. has, as of this date, 1,083,500 shares of its Common Stock issued and outstanding; it, therefore, considers each share of dividend in GENERAL AUTO PARTS STORES, INC. to its stockholders to be approximately valued at $.10 per share.

Sincerely yours,

Arthur Dash

Arthur Dash, Secretary

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

v. :

LAWRENCE LEVINE, : 74 Cr. 573

Defendant. :

- x

Before:

HON. CONSTANCE BAKER MOTLEY,
District Judge

New York, New York
September 22, 1975
10:00 a.m.

APPEARANCES:

FOR THE GOVERNMENT: FRANK WOHL, Esq.,
JO-ANN HARRIS, Esq.,
Assistant U. S. Attorneys

FOR THE DEFENDANT: THOMAS ANDREWS, Esq.,
JOHN GRIMES, Esq.

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MR. WOHL: The Government is ready on the motion, your Honor.

MR. ANDREWS: The defendant is ready, your Honor.

MR. WOHL: Your Honor, this is a motion by the Government to modify certain findings in your Honor's opinion concerning the post-trial motions of the defendants.

Obviously, the Government does not disagree with your Honor's ultimate finding or ultimate conclusion on this issue that at most what the defendants have here is an error which did not deprive, that is, an error by the Government, which did not deprive the defendants of a fair trial or entitled them to a new trial.

The Government's view, however, is that on one critical or significant - I suppose I should say -- matter, the Government's position is somewhat different from the position your Honor indicated the Government's position to be, and since this matter is quite likely to be raised by the defendants in the Court of Appeals, we felt that the proper thing to do was to bring this to your Honor's attention so that your Honor could give the Court of Appeals whatever insight your Honor had into the situation.

That finding is your Honor's finding that in the post-tril colloquy concerning the argument that I made in

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my rebuttal summation, that the Government agreed that the Lockwood blotter, Exhibit 500, had never been entirely in evidence in the trial.

The Government's position is that although we maintained it was in evidence entirely during the trial, we made a decision during the post-trial colloquy to ask your Honor not to send it to the jury at the request of the defense counsel, and in effect, we were agreeing to withdraw the exhibit although we maintained that it had been inevidence originally when I made the argument that I made.

In effect, the Government's view is that we withdrew the exhibit after the defense counsel claimed that they had been misled out of an abundance of caution and in the interest of justice to avoid any appearance that the Government had treated the defendants unfairly in this case.

I'd like briefly to review the facts.

First of all, you will recall that the defense counsel argued in his summation that as your Honor construed it, there were no similar acts as against defendant Levine proved by the Government.

Now, the Government's position has always been that he,in addition, argued that there was no other relationship between defendant Levine and Sidney Stein.

In rebuttal, the Government argued that the

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defense counsel will have us believe that this was a one-shot transaction between Sidney Stein and the defendants, and that that was not in fact the case because the Lockwood blotter showed that defendant Levine had been involved in a number of transactions with Mr. Stein because it showed that he was trading the same stocks that Mr. Stein had testified about.

The defendants then objected to that claiming that the blotter was not in evidence.

Your Honor may recall that I made the same argument,in effect, with respect to defendant Wax based on Exhibit 75.

THE COURT: I don't know that the defendants ever claimed that the exhibit was not in evidence. I thought their claim was that only those portions of the exhibit relating to Stern-Haskell were in evidence, and at the time I distinctly recall commenting, and I may be mistaken because I don't have the record before me, but it seemed to me that wehn this question first came up at the trial, I pointed out that the exhibit, the entire book, had gone into evidence without limitation as had been the case with respect to other exhibits, and if there were any understanding between counsel, it certainly was not made known to the Court and it was not on the record that the exhibit was

ew:mg 5

coming in with respect to only certain pages.

Then this colloquy ensued in which it turned out that apparently the defense counsel understood it was going in only with respect to certain pages, and the Government's counsel thought it was going in in its entirety because the book had not been disassembled. It had gone in in its entirety and it was going to be used to support the charts.

Is that your understanding of what occurred here?

MR. WOHL: Yes, your Honor, exactly.

THE COURT: Is that different from what I have said here?

MR. WOHL: Yes, your Honor.

THE COURT: Then I don't recall your second point, that you agreed to withdraw it. I think what we agreed was eventually that the exhibit was in evidence only with respect to certain pages.

The Government agreed to that and I so advised the jury when they came out and said, "Now, that book is inevidence only with respect to matters relating to Stern-Haskell, and if you want those pages, we can take them out, that's what the book is in evidence for."

One juror said,"No," so we didn't take the book apart.

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MR. WOHL: Exactly right, your Honor.

The only distinction here is that when the Government agreed that the jury be told that only the Stern-Haskell pages were in evidence, I did so without retracting any factual statement that Ms. Harris had made or that I had made, to wit, that there was no understanding about limiting this exhibit, but rather because the Government, in order to avoid any appearance of unfairness to these defendants, did not wish ot rely on the technical point of whetheror not the entire exhixit had come in.

In other words, I was saying that as a matter of law we believe the entire exhibit did come in.

The defendants claim that they were misled.

All right, in order to avoid any appearance that the Government has misled these defendants, we will then agree that they can have it the way they want it, that the jury will be told that only the Stern-Haskell exhibits are in evidence and my understanding of the effect of that was to withdraw the non Stern-Haskell portions and was not to, in effect, agree that the entire book had not come in in the first place, that is, that only portions of the exhibit had come in originally because at the point that I took that position, your Honor had already made a finding which we agree with now and we agreed with then: That the

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entire book had come in.

THE COURT: The only reason I set this down for hearing is that I don't see what I have written here, how that differs from that.

Do you want to point to the specific language you have in mind again? Was that on the bottom of page 18?

MR. WOHL: Yes, your Honor, the bottom of page 18 and going over to the top of page 19.

As we view it, particularly the last sentence of that paragraph which appears on page 19, "The parties agreed that only the Stern-Haskell pages had been admitted."

We did that to mean that your Honor understood that the Government had agreed that --

THE COURT: You mean that should read "would be admitted." "Eventually the parties agreed that only the Stern-Haskell pages would be admitted."

MR. WOHL: Yes.

THE COURT: All right, Mr. Andrews.

MR. WOHL: If I may just add the statement that also we wanted the record to be clear that there were no discussions with defense counsel about redacting this document in any way.

THE COURT: I thought on the bottom of page 18,

each party's position was then stated.

MR. WOHL: Fine, your Honor.

THE COURT: Mr. Andrews?

MR. ANDREWS: We would prefer to submit on paper what we offer to the Court, unless there's specific questions of the Court.

THE COURT: How do you disagree with what we have just said? That's my recollection now of what happened.

Is that incorrect in your view?

MR. ANDREWS: I am not exactly certain what was just said. My recollection --

THE COURT: Look at the top of page 19, the last sentence of that continuing paragraph from the bottom of page 18.

MR. ANDREWS: May I look at the Government's copy? We seem to have misplaced ours.

THE COURT: Yes, you may.

MR. ANDREWS: Your Honor, I am in complete agreement with the finding as expressed in your opinion in the paragraph beginning on page 18 and ending on page 19 as you pointed out this morning.

I thought, and let me say I don't really feel that it is for me to say what the Government agreed to

and what they didn't; my impression was, however, that the Government at the time we prepared the instruction, which is an exhibit, it was never read to the jury.

The Government agreed that the exhibit had not come into evidence in its entirety and there are numerous facts which substantiate that agreement by the Government.

First of all, the Wax records were by another Assistant United States Attorney expressly limited to Stern-Haskell transactions, even though they contained many, many other transactions in certain stocks, indeed, which Sidney Stein traded in as Lockwood & Company records.

The express stipulation in the record enunciated by Ms.Harris that all of the documents, including the one in question, were with respect to Stern-Haskell transactions.

In fact, the language of the stipulation or the requested instruction which the Government had asked your Honor to read and sign, asked you to read to the jury, may appear to us that the Government had agreed once the error had been pointed out, that the balance of the book had not been offered into evidence.

If the Government unilaterally intended that the entire book go into evidence, we think that that's a matter of no consequence. The question is since this book was admitted by stipulation, the question is what was agreed

upon.

I think it stretches the imagination to say that we agreed to anything other than Stern-Haskell in the light of what had gone on.

THE COURT: Let me ask you this. When the exhibit was received in evidence, was there a statement made that the parties had stipulated that this exhibit go into evidence or did it come in without any statement at all of a limiting nature.

Which is it?

MR. ANDREWS: I think Ms. Harris spoke--

THE COURT: No, I am asking you what transpired when that exhibit was received in evidence.

MR. ANDREWS: I believe what transpired and what the record says is that the exhibit, whatever it was, related to Stern-Haskell, and I think --

THE COURT: No, what happened when the exhibit was received in evidence. Find that part of the record.

MR. WOHL: I have it, your Honor.

THE COURT: What does it say?

MR. WOHL: It is at the end of a colloquy when there are some objections made.

THE COURT: Do those objections relate to the exhibit?

Did those objections relate to the admissibility of the exhibit or the conditions on which it was being admitted?

MR. WOHL: They relate to the admissibility of this exhibit along with a group of other exhibits, your Honor. It covers about eight pages, and first of all, Mr. Robson objects because he doesn't think it is adequately connected to his client, that is, the entire group of exhibits.

Then Mr. Andrews objects because he says the group of documents is not complete and therefore should not be admitted.

Then ultimately Mr. Andrews says that he wants a stipulation that some of the Lockwood documents are missing so that the jury doesn't get the impression that these are all the Lockwood documents, and it is stated on the record that some were never recovered.

After that I state "We will stipulate that it is" -- referring to the documents -- "everything we have and it appears some of the records are missing.

"The Court: With that understanding, it will be admitted into evidence.

"You can have the clerk start marking some and he can finish it in the morning, and at a recess tomorrow

and so forth."

THE COURT: In addition to the Lockwood blotter, what other exhibits were we talking about at that point?

MR. WOHL: We were talking about a number of Lockwood order tickets and other documents relating to Stern-Haskell. We were talking about brokerage house documets of Shaskan & Company, Granger & Company, and Tessel, Paturic & Ostrau & Company.

We were talking about, also, a number of brokerage documents from many different brokerage houses which were the other side of the transactions in Stern-Haskell by the companies that we are primarily talking about in the case, that is, specifically Lockwood & Company and the three firms that I just mentioned.

Whenever one of those firms would have a transaction with Stern-Haskell then the firm on the other side that they were selling the stock to or buying the stock from, would also create a document.

The documents that were being talked about there as a group of exhibits were the ones of the firms that had been primarily mentioned in the case; that is, Lockwood, Shaskan, Granger and Tessel, Paturic & Ostrau, and then this other group of documents which consisted of documents from eight different brokerage firms that were the other

side of those transactions.

I believe that's primarily a description of what the documents were.

THE COURT: Mr. Andrews, the first point is that when the blotter was received in evidence, if there were any such stipulations you contend between the Government's counsel and yourself, it would have been brought out then.

MR. ANDREWS: We believe it was.

THE COURT: There was no such stipulation.

MR. ANDREWS: We believe there was, your Honor.

THE COURT: Why wasn't it brought out when the document was received in evidence?

MR. ANDREWS: We believe that it was, your Honor.

THE COURT: Would you please point it out to me in the record?

MR. ANDREWS: What I can point out, your Honor, in my affidavit, your Honor, the stipulation of limitation--

THE COURT: Is that in writing, first of all?

MR. ANDREWS: No, it was never reduced to writing.

THE COURT: Is it set forth there in the record?

MR. ANDREWS: It is, your Honor. We say it is.

THE COURT: At the time the exhibit was received, I am talking about.

MR. ANDREWS: Yes, your Honor. I will find the

precise page and paragraph.

It is at page 4436 of the record and it reads as follows, and may I preface this by pointing out that out of all of the hundreds of documents that came in at that precise time, and under this stipulation, they all related solely to Stern-Haskell transactions except the Lockwood blotter which we say was not an exhibit.

That blotter contains each and every transaction that Lockwood & Company ever made in any stock, and yet all the other hundreds and literally hundreds that came in in that group related solely to Stern-Haskell transactions between Lockwood & Company, Shaskan --

THE COURT: Read the record, please.

You say there was a stipulation.

MR. ANDREWS: Ms. Harris said: "All of the documents are with respect to transactions in Stern-Haskell's stock, that would be the stipulation, your Honor."

When I heard that, Judge, and given past performance and given what the exhibit was, and given what I was told by Mr. Schatz and Ms. Harris, and given that the hundreds of exhibits all related solely to Stern-Haskell, and given the project involved in redacting the volume, I took Ms. Harris' word that this book was going in for Stern-Haskell transactions as back-up on the Government's chart.

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THE COURT: That statement was made at the time of admission?

MR. ANDREWS: Yes, Ma'am. That was made at page 4436.

Mr. Robson, speaking for all of us, by the way, pursuant to your Honor's instructions, again objected nevertheless--didn't really object,but consented subject to connection, which was the way that we all consented.

But that was the stipulation with respect to Stern-Haskell's transactions.

THE COURT: The problem with that, Mr. Andrews, is we are talking about a number of exhibits and with respect to this particular one, there was no clarification at that point in the record that that blotter was coming in only as to certain pages.

Now, that's the theory which led to this dispute which then developed, your understanding being it was coming in only as to certain pages and the Government's understanding that the whole thing was in, as all the transactions of Lockwood during that period.

That's what I thought I was saying on page 18; one party understood that the whole thing was in - that's Government's counsel, and the defense counsel understood it was only in for certain pages.

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Then as we have agreed now, at the top of page 19, I would say eventually the parties agreed that the Stern-Haskell pages had been admitted, that only the Stern-Haskell pages had been admitted.

Now, we are agreeing to change that to "would be admitted"?

MR. ANDREWS: "That only the Sterb-Haskell pages would be admitted."

THE COURT: No, the Government agreeing then to limited admission of the Stern-Haskell pages as a whole exhibit having come in.

MR. ANDREWS: That's obviously for the Court to decide. We don't agree that that's what happened, Judge, at all. We thought that the Government had agreed that it had made an error and that in fact the stipulation only covered Stern-Haskell transactions which is the exact language of the stipulation, and that the Government had agreed that indeed all of the other transactions did not come into evidence.

THE COURT: All right, with respect to this, then, the opinion is changed on the top of page 19, the last sentence of the first paragraph, to continue from page 18, to read as follows:

"Eventually the parties agreed that only the

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Stern-Haskell pages would be admitted, but the Government nevertheless continued to deny that his comments were inaccurate."

The original would be changed to read that way because I made clear on the record now it is my view that the document did come in as a whole without limitation and that subsequently the Government agreed to limit the document to Stern-Haskell pages only.

Thank you, gentlemen.

MR. ANDREWS: May I make an amplification, your Honor.

THE COURT: Yes.

MR. ANDREWS: It would seem to me that this document came into evidence only pursuant to stipulation and that a stipulation requires the agreement of both sides before the Court, in fact, ratify it by admitting the document into evidence.

The threshold, I think, the seminal question, then, is what in fact was agreed to by all parties. The Government has said for us, the defense, that we agreed that this voluminous book containing God knows how many transactions in stock only unrelated to Stern-Haskell, come into evidence. That is allegedly our agreement.

We say, and we swear, that that was not our

agreement.

We say that Ms. Harris spoke our agreement when she said all the documents are with respect to Stern-Haskell. That's what we agreed and that specifically, we think, eliminates all other documents on the question of what we agreed to, the defense -- not just me, but all the lawyers and the defendants pro se.

I would request strenuously that your Honor hold an evidentiary hearing on which all of us lawyers can get on the stand and give testimony under oath and be cross-examined under oath as to what we were told, what we agreed to, and why we believed that Ms. Harris' express language bespoke that agreement and limited the offer in evidence.

That's been denied.

The Government didn't get up and say: "Let's have that hearing," when we asked for it at trial and yet they come in with all of these affidavits now when we can't cross-examine anyone.

I am asking that I be permitted to testify under oath to what I was told because I think when you hear all of this -- Robson is a former United States Attorney in the Southern District, your Honor; I was with Frank Hogan for years -- if you hear us under oath, why, you are going to know the injustice that's happened here.

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THE COURT: I think the record in this case is clear and I don't know at what point, but most of the defense counsel never bothered before trial to look at the exhibits, Mr. Andrews.

The Government had a large number of exhibits in this case and the record will reflect on a number of occasions defense counsel looking at thos exhibits for the first time.

It was not clear in my view that the defense counsel even looked at this blotter and if there were any such agreement, that would have been mentioned by defense counsel at the time the exhibit came in.

That seems plain.

There is obvious confusion and unclarity as to the admission of this, and that's because defense counsel as a whole did not bother to look at these numerous exhibits and have a clear, precise understanding as to any of them, and that's reflected throughout the record. That's what happened. This was just one more instance where defense counsel didn't bother to go over the voluminous Government documents which were going to be offered in evidence.

MR. ANDREWS: Your Honor, before trial we looked at every exhibit the Government had. We came down to the office on many occasions to look at every single exhibit.

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In the courtroo. we saw again the Lockwood blotter.

THE COURT: Mr. Andrews, I am not going to hear any more. It seems plain to me that the defense counsel has the responsibility, pursuant to some understanding of the Government, to make sure that the record reflects that understanding,and defense counsel certainly didn't do that here so defense counsel will have to share the blame with the Government for the unclarity of this.

That's all.

MR. GRIMES: Your Honor, may I put one thing on the record?

THE COURT: I am not going to hear anyone else.

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Form No. USA-33s-270
(Rev. 10-25-65)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

LAWRENCE LEVINE,

Defendant.

NOTICE OF MOTION

74 Cr. 573 (CBM)

PAUL J. CURRAN

United States Attorney
Attorney for USA

TEL. ~~964-3211~~
791-9088

Due service of a copy of the within is hereby admitted.

New York, ..., 19....

Attorney for

To

Attorney for

Please take notice that a ..... within is a copy, was this day in the within entitled action, of the Clerk of this Court.

..., 19....

Yours, etc.,

United States Attorney
Attorney for .....

Attorney for .....

e notice that the within ..... nted for settlement and sig- e Honorable ..... s District Judge, at the office of oom 601, United States Court- Square, Borough of Manhat- New York, on the ..... day of 19...., at 10:30 o'clock in the or as soon thereafter as coun- eard.

Y., ..., 19....

Yours, etc.,

United States Attorney
Attorney for .....

2136a Endorsed Order

U.S. FILED
SEP 23 1975
S.D. OF N.Y.

had large portions of the blotter been redacted since, given the large size of the document, both techniques for limiting the portion admitted would have been somewhat impractical. Eventually, the parties agreed that only the Stern-Haskell pages had been admitted, but the Government nevertheless continued to deny that its comments were inaccurate.

The Government's position, as clarified, was that although there was no evidence of prior similar acts in the record (since the bulk of the Lockwood blotter was not in evidence), the Government could have proved a course of fraudulent transactions between Levine and Stein. This was what the Government had intended to convey to the jury in its rebuttal summation. The Government noted, for example, that fraud could have been proved as to dealings in Eastern Diversified securities, and that Wax and Levine had invoked the Fifth Amendment during proceedings before the S.E.C. (Tr. at 7402) Of course, this evidence is not conclusive of fraud or prior similar acts by defendant Levine. Other evidence which the Government possessed and might have introduced, however, may have proved more convincing.